CALIFORNIA JUDGES BENCHGUIDES

Benchguide 98

DEATH PENALTY BENCHGUIDE: PRETRIAL AND GUILT PHASE

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ADMINISTRATIVE OFFICE OF THE COURTS

EDUCATION DIVISION/CENTER FOR JUDICIAL EDUCATION AND RESEARCH

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DEATH PENALTY BENCHGUIDE: PRETRIAL AND GUILT PHASE

I. SCOPE OF BENCHGUIDE AND INTRODUCTION

A. [§98.1] Scope

This benchguide provides an overview of death penalty cases through the guilt phase for trial judges. The focus is on procedure rather than on comprehensive discussion of the applicable law. For the latter, see, *e.g.,* 3 Witkin & Epstein, California Criminal Law, *Punishment* §§408–501 (3d ed 2000). The benchguide emphasizes those aspects of capital cases that distinguish them from other felonies.

B. [§98.2] Capital Case: Definition and Types

In California, a capital case is one in which the death penalty may be imposed under the applicable Penal Code provisions, primarily Pen C §§190.1–190.9. See Pen C §190.1. In this benchguide, "capital case" and "death penalty case" are used interchangeably.

There are two types of death penalty cases. In the first and by far the most frequent, a defendant is charged with murder and one or more special circumstances. When a defendant is convicted of first degree murder and at least one special circumstance has been found, the penalty is death or imprisonment for life without possibility of parole (LWOP). Pen C §190.2(a). Conspiracy to commit murder is not a capital offense; special circumstances do not apply to this crime. *People v Hernandez* (2003) 30 C4th 835, 864–870, 134 CR2d 602.

The second type is limited to a handful of offenses, conviction of which can result in a death sentence without proof of special circumstances. Among them are assault by a life prisoner that results in death within a year (Pen C §4500), treason (Pen C §37), and train wrecking resulting in death (Pen C §219). See also Pen C §128 (perjury resulting in execution of innocent person); Mil & V C §1672(a) (interfering with war preparations resulting in death). Except for the absence of special circumstances, these cases follow the same procedures as other death penalty cases. Pen C §190.3 (penalty determination).

A murder case becomes a capital case for the purpose of the special rules applicable to death penalty cases when the prosecutor charges one or more special circumstances or one of the offenses that can result in a death sentence without proof of special circumstances. Status as a capital case ceases when death is no longer a possible sentence, *e.g.,* when charges are eliminated, the prosecutor states that the death penalty will not be sought, the jury finds the special circumstance allegations not true, or the jury imposes a sentence other than death. Often, a case will metamorphose through these stages. See *People v Ward* (2005) 36 C4th 186, 197–198, 30 CR3d 464 (court lacks authority to keep second counsel in trial of severed noncapital charge).

☛ JUDICIAL TIP: It is often useful to check quickly whether the particular case is (still) a capital one. See, *e.g.,* discussion in §§98.6(5), 98.9(4).

When the prosecutor initially does not charge special circumstances but indicates the intention to do so later by amendment, the defendant cannot block the amendment by attempting to plead guilty to the murder charged in the initial complaint. *People v Michaels* (2002) 28 C4th 486, 512–514, 122 CR2d 285. When a defendant pleads guilty following the trial court's dismissal of the special circumstances, knowing that the prosecution might appeal, defendant cannot prevent a death penalty trial if the dismissal is reversed. *People v Jurado* (2006) 38 C4th 72, 93–97, 41 CR3d 319 (no double jeopardy); *People v Superior Court* (Jurado) (1992) 4 CA4th 1217, 6 CR2d 242 (no double jeopardy).

C. Major Differences Between Capital and Other Felony Cases

1. [§98.3] Divided Trial; Jury Determination of Penalty

A death penalty trial occurs in distinct stages. During the so-called guilt phase, the jury (or other trier of fact) decides whether the defendant is guilty of first degree murder and, if so, whether any of the charged special circumstances are true. Pen C §§190.1(a), 190.4(a); for exception, see below.

The second stage of the trial—the penalty phase—takes place only when the jury has found at least one special circumstance to be true. Pen C §190.4(a). In the penalty phase, the jury (unless waived) makes one of two sentence choices: death or life without possibility of parole. Pen C §§190.3, 190.4(a). A defendant convicted without a jury is still entitled to have a jury determine the penalty. Pen C §190.4(a).

The same jury usually hears both phases of the trial. The court has authority to impanel a new jury for the penalty phase on a showing of good cause (Pen C §190.4(c)), but this rarely happens except in a retrial of the penalty phase. See California Judges Benchguide 99: *Death Penalty Benchguide: Penalty Phase and Posttrial* §§99.6–99.7 (Cal CJER).

Each phase includes elements of a distinct trial, such as opening statements, presentation of evidence, closing arguments, instructions, and verdict. For most purposes, however, the guilt and penalty phases are treated as aspects of a single trial. See *People v Hamilton* (1988) 45 C3d 351, 369, 247 CR 31.

Occasionally a death penalty case has more than two stages. The truth of a special circumstance charging a prior first or second degree murder conviction is determined in a separate hearing conducted after the guilt phase. Pen C §190.1(b). The jury also determines sanity under a plea of not guilty by reason of insanity in another separate hearing between the guilt and penalty phases. Pen C §190.1(c). Competence, like sanity, is

tried separately. Pen C §§1367–1370; see *People v Turner* (2004) 34 C4th 406, 423–434, 20 CR3d 182. See also *People v Ramos* (2004) 34 C4th 494, 509, 21 CR3d 575 (death wish and history of psychiatric treatment alone do not indicate present incompetence). An additional separate phase is a jury determination whether the defendant is mentally retarded. Pen C §1376(b)(1); see §§98.4(16), 98.20–98.29.

2. [§98.4] Other Distinctive Features of Capital Cases

(1) Judges should have comprehensive training in capital case law and procedure before starting a death penalty trial, and they should also complete periodic update courses. Cal Rules of Ct 10.469(d). CJER provides such training.

(2) A pro per defendant cannot plead guilty; a represented defendant can plead guilty only with counsel's consent. Pen C §1018; see *People v Alfaro* (2007) 41 C4th 1277, 1294, 63 CR3d 433. A guilty plea must be to first degree murder, not to murder in an unspecified degree, even when the defense is willing to have the court determine the degree without a jury. *Sanchez v Superior* Court (2002) 102 CA4th 1266, 1268, 126 CR2d 200. A capital case is no exception, however, to the principle that the judge needs to inquire into the factual basis of a guilty plea only when there is a plea bargain. *People v Fairbank* (1997) 16 C4th 1223, 1245, 69 CR2d 784.

(3) All proceedings, including chambers conferences, must be on the record and reported. Daily transcripts are mandatory beginning with the preliminary hearing. Pen C §190.9; *People v Arias* (1996) 13 C4th 92, 159, 51 CR2d 770 (admonishing trial courts to comply meticulously with Pen C §190.9); *Abernathy v Superior Court* (2007) 157 CA4th 642, 647–650, 68 CR3d 726 (defendant charged with murder and special circumstances is entitled to daily preliminary hearing transcript even if prosecution has not yet stated whether it will seek death penalty).

☛ JUDICIAL TIP: Do not ever engage in off-the-record discussions in a capital case. See *People v Harris* (2008) 43 C4th 1269, 1283, 78 CR3d 295. Experienced judges consider this to be one policy that admits of no exceptions.

(4) Defendant is usually not entitled to bail. Cal Const art I, §12; Pen C §1270.5; for discussion, see §98.5.

(5) Defendant can apply for ancillary funds necessary for defense of the case. Pen C §987.9(a); for discussion, see §98.6.

(6) Defendant may be entitled to the appointment of an additional attorney. Pen C §987(d); for discussion, see §98.9. Appointed attorneys, whether lead counsel or second attorneys, must meet the qualifications set

out in Cal Rules of Ct 4.117. Both counsel need not be present at all times. *People v Benavides* (2005) 35 C4th 69, 86, 24 CR3d 507.

(7) Defendant is entitled to notice of evidence that the prosecutor will offer at the penalty phase. Pen C §190.3; for discussion, see §§98.13–98.17.

(8) Capital defendants have broader rights than noncapital defendants to collaterally attack prior convictions. For discussion, see §98.19.

(9) The jury must be "death qualified" through the selection process. For discussion, see §§98.39–98.50.

(10) Each side in a capital case is entitled to twenty peremptory challenges. Codefendants exercise them jointly; each defendant has five additional challenges to use individually. The prosecution has the same number of additional challenges. *People v Lewis* (2008) 43 C4th 415, 490–493, 75 CR3d 588; CCP §231.

(11) Capital defendants may not voluntarily waive their right to be present during the trial when evidence is being taken. *People v Rundle* (2008) 43 C4th 76, 134, 74 CR3d 454; Pen C §§977, 1043(b)(2). This principle extends to jury views. *People v Garcia* (2005) 36 C4th 777, 31 CR3d 541 (right extends to jury visit of crime scene; conviction reversed). See *People v Majors* (1998) 18 C4th 385, 413–415, 75 CR2d 684 (trial court may permit waiver when defendant says he is likely to be disruptive).

The right to be present rests on the Sixth Amendment; the barrier to voluntary waiver is statutory. *People v Dickey* (2005) 35 C4th 884, 923, 28 CR3d 647; *People v Young* (2005) 34 C4th 1149, 1213–1214, 24 CR3d 112; Pen C §§977, 1043. See *People v Davis* (2005) 36 C4th 510, 529–532, 31 CR3d 96 (standards for waiver of constitutional right to be present). The constitutional right does not extend to chambers' discussion of juror hardship excuses. *People v Rogers* (2006) 39 C4th 826, 856, 48 CR3d 1. When the defendant is hospitalized, the verdict can be read in defendant's absence. *People v Lewis and Oliver* (2006) 39 C4th 970, 1040, 47 CR3d 467.

(12) Counsel may not withhold the presentation of any evidence at the guilt phase over defendant's express objection, as long as there is credible evidence to support the defense. *In re Burton* (2006) 40 C4th 205, 213, 52 CR3d 86; *People v Frierson* (1985) 39 C3d 803, 218 CR 73.

(13) In a capital case, the court should provide the jury with written instructions. *People v Seaton* (2001) 26 C4th 598, 673, 110 CR2d 441 (not mandatory); see *People v Prieto* (2003) 30 C4th 226, 255, 133 CR2d 18 (written instructions cure judge's oral misreading).

(14) The penalty phase of the trial differs in major respects from other trials. See California Judges Benchguide 99: *Death Penalty Benchguide: Penalty Phase and Posttrial* (Cal CJER). An error during the

penalty phase is prejudicial if "there is a reasonable *possibility*" that it affected the verdict. *People v Wilson* (2008) 43 C4th 1, 28, 73 CR3d 620 (italics in original).

(15) When a defendant has been sentenced to death, there is an automatic motion for modification. Pen C §190.4(e).

(16) After a judgment of death, there is an automatic appeal to the California Supreme Court (Pen C §1239(b)) with special provisions governing preparation and certification of the record (Pen C §§190.7–190.8; Cal Rules of Ct 8.600–8.622). The defendant may not waive the automatic appeal. *People v Massie* (1998) 19 C4th 550, 566, 79 CR2d 816.

(17) Certain persons may not constitutionally be executed:

- Juvenile offenders who were under 18 when they committed the capital offense. *Roper v Simmons* (2005) 543 US 551, 125 S Ct 1183, 161 L Ed 2d 1; Pen C §190.5. But defendants who were 18 at the time of the murder(s) are subject to the death penalty. *People v Gamache* (2010) 48 C4th 347, 404, 106 CR3d 771.
- A defendant who commits child rape that did not result, and was not intended to result, in death. *Kennedy v Louisiana* (2008) 553 US 723, 128 S Ct 2641, 171 L Ed 2d 525. Also, an offender who raped an adult. *Coker v Georgia* (1977) 433 US 584, 97 S Ct 2861, 53 L Ed 3d 982.
- Mentally retarded persons. *Atkins v Virginia* (2002) 536 US 304, 122 S Ct 2242, 153 L Ed 2d 335; Pen C §1376. For discussion, see §§98.20–98.29.
- Persons who are insane at the time of the scheduled execution, despite prior findings of competency. *Ford v Wainwright* (1986) 477 US 399, 409–410, 106 S Ct 2595, 91 L Ed 2d 335; see *Panetti v Quarterman* (2007) 551 US 930, 127 S Ct 2842, 168 L Ed 2d 662.

II. PRETRIAL MATTERS

A. [§98.5] Bail Motions

The constitutional provision that a person must be released on bail except for capital crimes when the facts are evident or the presumption great, Cal Const art I, §12(a), and its statutory counterpart, Pen C §1270.5, have given rise to the shorthand statement that persons charged with capital offenses are not entitled to bail, *e.g., In re Bright* (1993) 13 CA4th 1664, 1667, 17 CR2d 105. More accurately, "[b]ail properly may be denied in a capital case when the facts are evident or the presumption is great." 13 CA4th at 1672.

This principle applies even when there is no possibility of a death sentence. *People v Superior Court* (Kim) (1993) 20 CA4th 936, 940–941, 25 CR2d 38 (juvenile could not be sentenced to death); *Maniscalco v Superior Court* (1993) 19 CA4th 60, 63, 23 CR2d 322 (district attorney stated he would not ask for death). In other words, a defendant charged with special circumstances but no longer facing a death sentence continues to suffer the disabilities of Cal Const art I, §12, but loses the benefits of co-counsel and funds for ancillary services. See discussion in §§98.9, 98.6. For explanations of this disparity, see *In re Bright*, *Maniscalco v Superior Court, supra,* and *People v Superior Court* (Kim)*, supra*.

Defendant is entitled to a hearing on whether the facts are evident or the presumption great. *Clark v Superior Court* (1992) 11 CA4th 455, 457 n4, 14 CR2d 49.

There is little recent guidance about the meaning of the famous phrase concerning evident facts and a great presumption or about the manner in which the hearing is to be conducted. Apparently the phrase means that bail should be refused in a capital case when the evidence is such that a verdict of guilty based on it would be sustained by a court. *In re Weinberg* (1918) 177 C 781, 782, 171 P 937; *Ex Parte Curtis* (1891) 92 C 188, 192, 28 P 223; see *In re Nordin* (1983) 143 CA3d 538, 543, 192 CR 38 (construes similar wording in another subsection of Cal Const art I, §12). *In re Page* (1927) 82 CA 576, 579, 580, 255 P 887, required even less (bail refusal justified if evidence as a whole sufficient to induce belief that petitioner may have committed offense charged).

A capital case bail hearing is not a mini-trial; it is usually decided on transcripts of prior proceedings, such as a preliminary hearing (*Ex Parte Curtis, supra; In re Page, supra*), the acquittal of defendant on a related charge, or the inability of the jury to agree in a prior trial (*In re Weinberg, supra*). In *Curtis*, the court held that defendant may not supplement the preliminary hearing evidence.

The prosecutor probably has the burden of establishing that the case comes within the exception to the constitutional right to bail. See *People v Laiwa* (1983) 34 C3d 711, 725, 195 CR 503; *Badillo v Superior Court* (1956) 46 C2d 269, 294 P2d 23 (prosecution has burden of proving that warrantless search comes within exception to Fourth Amendment prohibition of unreasonable searches). Bail in capital cases is extremely rare; most judges have never granted it.

B. [§98.6] Checklist: Application for Funds

Under Pen C §987.9, an indigent defendant in a capital case may request funds for investigators, experts, and others who may assist in the preparation or presentation of the defense. Penal Code §987.9 requires that:

- The application for funds be by affidavit, which must specify that the funds are reasonably necessary for the preparation or presentation of the defense.
- Both the fact that an application has been made and its contents are confidential.
- On receipt of the application, a judge, other than the trial judge presiding over the case, must rule on the reasonableness of the request at an in camera hearing.

In making the ruling, the court must be guided by defendant's need for a complete defense. Pen C §987.9(a). Some judges consider and rule on the application without counsel being present.

(1) *Do not consider the application after being assigned to try the case*.

☛ JUDICIAL TIP: If the judge who is to try the case receives a Pen C §987.9 request, the application should be referred to another judge, such as the supervising or presiding judge. That judge should keep the application, all records concerning it, and rulings under seal, separately from the case file. In some counties, a three-judge panel deals with such applications. The judge(s) who do that cannot hear other matters in the case. *City of Alhambra v Superior Court* (1988) 205 CA3d 1118, 1128, 252 CR 789.

(2) *Treat the application and the fact that it has been made as confidential from the outset and throughout the case.* The application is not noticed and is made ex parte. See Pen C §987.9.

☛ JUDICIAL TIP: Court personnel should be instructed to maintain confidentiality. The application should not be discussed with judges other than members of the panel that will rule on the application.

(3) *Conduct in camera hearing with defense counsel.* Pen C §987.9. The hearing must be reported. Pen C §190.9.

(4) *Obtain waiver of defendant's presence unless a waiver is included in the application.* Some judges believe a waiver is unnecessary: the defendant's right to be present applies only to proceedings that bear a reasonable, substantial relation to defending the charges. See, *e.g., People v Clark* (1993) 5 C4th 950, 1011, 22 CR2d 689.

(5) *Determine whether preconditions to considering the merits have been met* (see Pen C §987.9).

- Has defendant been found indigent?
- Is the application in the form of (or accompanied by) an affidavit?

- Is death a possible sentence? Notice from the prosecution that it will seek the death penalty is not necessary. See *Abernathy v Superior Court* (2007) 157 CA4th 642, 648 n5, 68 CR3d 726; *Gardner v Superior Court* (2010) 185 CA4th 1003, 111 CR3d 155. However, Pen C §987.9 does not apply when the possibility of a death sentence has been eliminated by court ruling or the prosecution's clear statement that it will not seek it. *Corenevsky v Superior Court* (1984) 36 C3d 307, 318, 204 CR 165; *Sand v Superior Court* (1983) 34 C3d 567, 572, 194 CR 480.

If the answer to any question is no, the judge should deny the application, note the reasons on the record, and proceed to step (9). The answers will normally be in the affirmative. When they are, proceed to step (6).

☛ JUDICIAL TIP: When the court has reason to expect that the death-as-a-potential-sentence issue is likely to be resolved soon, a brief continuance of the hearing may be useful. However, extensive continuances should be avoided, especially over counsel's objection.

(6) *Discuss the application and any questions regarding it with defense counsel.*

(7) *Rule on the reasonableness of the request in light of "the need to provide a complete and full defense for the defendant."* Pen C §987.9(a). It is permissible to consider the likely utility of the request relative to its cost. See *People v Daniels* (1991) 52 C3d 815, 831, 277 CR 122. The state need not supply an indigent with "all the assistance that his wealthier counterpart might buy," but the court must make certain that the defendant has access to raw materials necessary to build an effective defense. *Ake v Oklahoma* (1985) 470 US 68, 77, 105 S Ct 1087, 84 L Ed 2d 53 (conviction reversed because court refused psychiatric examination relevant to insanity and other defenses). Generally the court should view the request "with considerable liberality." *Corenevsky v Superior Court, supra,* 36 C3d at 320. Payment of attorneys' fees by an indigent defendant's family is not a proper ground for denying the motion, unless the fee "exceeds the bounds of reason or shocks the conscience." *Tran v Superior Court* (2001) 92 CA4th 1149, 1157, 112 CR2d 506 ($300,000 fee not unreasonable).

☛ JUDICIAL TIPS:

- The presence or absence of state reimbursement of county expenditures has no bearing on the merits, but judges sometimes negotiate and limit amounts.

- The judge should not take these requests under submission; if necessary, the hearing should be continued briefly (*e.g.,* for additional information). The ruling must be made at a hearing. Pen C §987.9(a).
- It is a good idea to state the reasons for denying the application or any part of it on the record.
- The application should not be denied on the ground that it is made by a defendant appearing in pro per. Penal Code §987.9 applies to pro per defendants. *People v Clark* (1992) 3 C4th 41, 112, 10 CR2d 554; *People v Faxel* (1979) 91 CA3d 327, 154 CR 132.

Funds are often sought for the following:

(a) *Psychiatric examinations.* Some judges ask defense counsel to submit names of three doctors. This practice may be appropriate when there is a sanity or competence determination, but most judges consider it improper to limit the defense when the evidence is sought for use during the penalty phase. Requiring defendant to choose from a list of approved psychiatrists is permissible only when there is a panel member with experience in the specialty needed for the particular defendant. *Doe v Superior Court* (1995) 39 CA4th 538, 546, 45 CR2d 888.

(b) *Expert witnesses.* The defense will often request such witnesses in areas where the prosecution relies on experts, but should not be limited to those areas.

☛ JUDICIAL TIPS:

- Counsel should be encouraged to identify experts early, although this is not always feasible as to penalty phase witnesses. Early identification is likely to reduce delay and eliminate later problems.
- When the court uses a list of approved experts, defendant should be permitted to go outside the list when the panel includes no one who has the requisite expertise. See *Doe v Superior Court, supra.* Some judges also allow defendant to employ penalty phase experts who are not on the approved list.

(c) *Investigators.* Investigators are more likely to be needed by pro per defendants and court-appointed attorneys than by a public defender whose office has an investigative staff.

☛ JUDICIAL TIPS:

- Some judges prohibit out-of-state travel by investigators. These judges ask counsel to use local investigators when an investigation in another state is needed.
- Some courts will not compensate investigators for time spent in the courtroom without advance judicial approval.

(d) *Jury selection consultants.* Courts are often asked for but infrequently grant requests for jury consultants. Counsel's inexperience in selecting a death-qualified jury and the inflammatory nature of the case are not compelling bases for granting such a request. *People v Mattson* (1990) 50 C3d 826, 847, 268 CR 802. The prosecutor's use of a jury consultant does not compel a different result, unless a consultant would offer the defense expertise not already available to counsel. *People v Box* (2000) 23 C4th 1153, 1182–1185, 99 CR2d 69.

(e) *Law clerks.* Law clerks are often needed by pro per defendants. See *People v Clark, supra; People v Faxel, supra.*

(f) *Application in aid of motion.* A Pen C §987.9 application may be made in aid of a motion. For example, the defense might seek to support a change of venue motion with survey data to determine the effects of pretrial publicity. See *People v Daniels, supra.*

(8) *Review proposed order.* Modify it if necessary and sign it.

(9) *Order reporter's notes and papers pertaining to the application sealed.*

C. Representation Issues

1. [§98.7] Introduction; Terminology

Distinctive to capital cases is the request for the appointment of an additional attorney to act as co-counsel with defendant's first attorney. See §98.9. Other matters pertaining to representation arise more often in capital cases than in others. The principles and procedures that apply to them are essentially the same as in non-death-penalty cases and will be discussed only briefly (§§98.10–98.12).

Terminology.

- *Co-counsel* can participate in hearings and in the trial subject to the direction of the principal counsel.
- *Advisory counsel* may—as the term suggests—advise a pro per defendant but usually may *not* participate actively in the case by, *e.g.,* arguing motions or examining witnesses. For further discussion, see §98.11.
- *Standby counsel* may be appointed for pro per defendants who do not have advisory counsel. Standby counsel's function is to take

over the defense in the event defendant later changes his or her mind about self-representation or the court terminates self-representation. See §98.8. For a discussion of such termination, see California Judges Benchguide 54: *Right to Counsel Issues* §§54.18–54.20 (Cal CJER).

2. [§98.8] Overview

(1) *When defendant is represented*.

(a) Defense counsel's request for the appointment of co-counsel is often granted. For discussion, see §98.9.

(b) A defendant's request to act as co-counsel requires a strong showing. See §98.12.

(2) *Right to self-representation*. A capital case defendant has the same right to self-representation as in other cases. See §98.10.

(3) *When defendant appears in pro per.*

(a) Defendant has no right to have co-counsel appointed. See §98.9 for discussion.

(b) Courts may appoint advisory counsel. See §98.11.

(c) When there is no advisory counsel, courts often appoint standby counsel. There is no constitutional barrier to appointing standby counsel over a pro per's objection. *McKaskle v Wiggins* (1984) 465 US 168, 178–179, 104 S Ct 944, 79 L Ed 2d 122.

☛ JUDICIAL TIP: Many judges strongly recommend appointing standby counsel for a pro per defendant who has no advisory counsel. This will avoid a crisis and a possible mistrial if self-representation is terminated during the trial, or if the defendant later has a change of mind about representation. See *People v Mendoza* (2000) 24 C4th 130, 156, 99 CR2d 485. It is not easy to find competent attorneys willing to serve as standby counsel.

For substitution of appointed counsel (*Marsden* motion), see *People v Abilez* (2007) 41 C4th 472, 487, 61 CR3d 526 (court must permit defendant to explain and give examples; defendant entitled to relief only on showing of inadequate representation or irreconcilable conflict); *People v Valdez* (2004) 32 C4th 73, 96–97, 8 CR3d 271 (scope of *Marsden* inquiry by trial court); California Judges Benchguide 54: *Right to Counsel Issues* §§54.3, 54.22–54.32, 54.41–54.43 (Cal CJER). Complaints of lack of communication between defendant and counsel are not a request for substitution and do not require a *Marsden* hearing. *People v Martinez* (2009) 47 C4th 399, 418, 97 CR3d 732. Complaints from third persons do not impose a duty to conduct a *Marsden* inquiry. 47 C4th at 419. Even retained counsel may not be discharged if the discharge would result in disrupting the orderly processes of justice. *People v Verdugo* (2010) 50 C4th 263, 311, 113 CR3d 803.

As to requests for appointment of a particular person as counsel, see *People v Cole* (2004) 33 C4th 1158, 1179–1187, 17 CR3d 532 (no abuse in refusing to appoint counsel who had represented defendant as member of Alternative Defense Counsel and then left ADC office); *People v Horton* (Horton II) (1995) 11 C4th 1068, 1098, 47 CR2d 516 (not abuse of discretion to refuse to appoint counsel who had represented defendant in municipal court); *Harris v Superior Court* (1977) 19 C3d 786, 798, 140 CR 318 (refusal was an abuse of discretion under the particular circumstances). Some judges favor granting a request to appoint the attorney who represented defendant at the preliminary hearing, as long as defendant does not object. Even though not mandatory in light of *People v Horton, supra,* such an appointment can avoid duplication of legal work by the defense. See also *People v Cole, supra* (refusal to appoint counsel who had represented defendant caused considerable delay and later hearings on counsel issues). For a discussion of removal and withdrawal of counsel, see California Judges Benchguide 54: *Right to Counsel Issues* §§54.32, 54.35 (Cal CJER).

3. [§98.9] Checklist: Request for Appointment of Additional Attorney

Under Pen C §987(d):

- The court may appoint an additional attorney as a co-counsel on a written request of the first attorney appointed.
- The request must be supported by an affidavit, setting forth the reasons for a second attorney in detail.
- Any affidavit filed with the court will be confidential and privileged.

The court must appoint a second attorney when it is convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation. Pen C §987(d). If the request is denied, the court must state on the record its reasons for denial of the request. Pen C §987(d).

(1) *Have court reporter present.* Pen C §190.9.

(2) *Treat the supporting affidavit as confidential and privileged* (Pen C §987(d)) *and direct court personnel to do the same.*

(3) *Obtain waiver of absent defendant's presence unless a waiver is included in the application.*

(4) *Determine whether preconditions to considering the merits of the request have been met:*

(a) Is the request in writing? Pen C §987(d).

(b) Is it made by the first attorney appointed? Pen C §987(d). *It may not be made by or for a pro per defendant. Scott v Superior Court* (1989)

212 CA3d 505, 511, 260 CR 608. The statute also appears to preclude *retained* counsel from making the application. Equal protection considerations may require exceptions, but the courts have not resolved this issue.

(c) Is the request in the form of or accompanied by an affidavit? Pen C §987(d).

(d) Is death a possible sentence? When special circumstances have not yet been charged, or when a court ruling or statement by the prosecutor has eliminated death as a potential sentence, Pen C §987(d), like Pen C §987.9, does not apply. See discussion in §98.6(5).

If the answer to any question is no, the judge should deny the request, state the reasons for the denial on the record (Pen C §987(d)), and proceed to step (8).

(5) *Discuss the application and any questions concerning it with defense counsel.*

(6) *Determine whether the appointment is necessary to give the defense effective representation.* Pen C §987(d). The key considerations are the complexity of the issues and the critical role that pretrial preparation may play in the eventual outcome. *Keenan v Superior Court* (1982) 31 C3d 424, 432, 180 CR 489; see *People v Wright* (1990) 52 C3d 367, 411, 276 CR 731. Defendant has the burden of showing necessity; counsel's inexperience and busy schedule do not compel the appointment of a second attorney. *People v Lancaster* (2007) 41 C4th 50, 71–72, 58 CR3d 608.

☛ JUDICIAL TIPS:

- Courts have a great deal of discretion here (see *People v Verdugo* (2010) 50 C4th 263, 277–279, 113 CR3d 803; *People v Wright, supra*, 52 C3d at 411), and judges' practices vary. Some judges usually grant the request; they believe that most capital cases are too complex for a single attorney and that the second lawyer should start work on defense of the penalty phase as soon as possible. See also ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1.A.1 (defense team should consist of no fewer than two qualified attorneys). Other judges disagree and often deny such requests in the absence of a strong case-specific showing.
- Courts in many, but not all, counties expect public defender offices and contract panels to provide any additional counsel out of their budgets.

(7) *Make certain that any appointment complies with* Cal Rules of Ct 4.117 (qualifications for appointed counsel in capital cases). The rule also covers the appointment of lead counsel.

(8) *Sign the order.* If request is denied, the judge must state reasons on the record. Pen C §987(d).

(9) *Order the affidavit and reporters' notes sealed.*

(10) *Set up a tickler system to terminate the appointment in the event death ceases to be a possible sentence.*

☛ JUDICIAL TIP: On receipt of notice that death is not an issue, the clerk should be requested to set a hearing to terminate second counsel's appointment. Sufficient time for termination should be allotted because the particular division of work between the two attorneys may preclude quick termination.

4. [§98.10] Request To Proceed in Pro Per

Even a capital case defendant has the right to waive counsel and to self-representation, subject only to the usual limitations that defendant elects to do so voluntarily, intelligently with knowledge of the risks and consequences, and in a timely fashion. *Faretta v California* (1975) 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562; *People v Blair* (2005) 36 C4th 686, 736–739, 31 CR3d 485 (right not limited to guilt phase). *People v Dent* (2003) 30 C4th 213, 218, 132 CR2d 527 (conviction reversed because trial judge denied self-representation request on ground that case was a capital one); for procedure, see California Judges Benchguide 54: *Right to Counsel Issues* §§54.4–54.21 (Cal CJER).

Other improper grounds for denial. A capital defendant's *Faretta* motion may *not* be denied because he or she:

- Did not finish high school and was a slow learner. *People v Halvorsen* (2007) 42 C4th, 379, 433, 64 CR3d 721.
- Cannot prepare adequately because of jail restrictions. *People v Butler* (2009) 47 C4th 814, 827, 102 CR3d 56.
- Is likely to perform poorly. *People v Taylor* (2009) 47 C4th 850, 866, 102 CR3d 852.
- Suffers from psychological defects unless
  - — They render the defendant incompetent to stand trial (see *People v Halvorsen, supra*, 42 C4th at 433), or
  - — Psychiatric studies establish, in exceptional cases, that the defendant suffers from a mental illness so severe that the defendant is not competent to conduct trial proceedings by himself or herself. *Indiana v Edwards* (2008) 554 US 164, 128 S Ct 2379, 171 L Ed 2d 345.

☛ JUDICIAL TIPS:

- Do not grant the *Faretta* motion of a defendant who is incompetent under Pen C §1368.
- Experienced judges recommend exceptional caution when considering whether to deny pro per status to one who is not incompetent under Pen C §1368, in light of how undeveloped the law is under *Indiana v Edwards, supra*.

A *Faretta* waiver of the right to counsel is not intelligent when the defendant does not fully understand that the court is not obligated to appoint counsel once the *Faretta* motion is granted. *People v Stanley* (2006) 39 C4th 913, 932, 47 CR3d 420.

☛ JUDICIAL TIP: When you advise the defendant of the dangers and disadvantages of self-representation, clearly tell the defendant that he or she will have no right to standby or advisory counsel. See *People v Burgener* (2009) 46 CA4th 231, 239, 92 CR3d 883.

The request to proceed in pro per must be unequivocal. *People v Roldan* (2005) 35 C4th 646, 683, 27 CR3d 360 ("I'll be my own lawyer if . . ." not unequivocal); *People v Marlow* (2004) 34 C4th 131, 147, 17 CR3d 825 (question to judge whether defendant could go pro per is not request). For a discussion of factors that the court should consider when a defendant makes a midtrial request for self-representation, see *People v Windham* (1977) 19 C3d 121, 128, 137 CR 8; see also *People v Roldan, supra,* 35 C4th at 684 (application of *Windham* factors in capital case).

☛ JUDICIAL TIPS: A written *Faretta* waiver, though not required, is highly recommended, as well as a thorough colloquy. The judge should allow and encourage defendant to speak fully, without being interrupted, in support of the motion.

Two consequences flow from granting the motion:

(1) Defendant will not be allowed to plead guilty as long as he or she is unrepresented. Pen C §1018. This may not be a serious disadvantage because a capital case defendant with counsel can plead guilty only with the attorney's consent. Pen C §1018.

(2) Advisory counsel is often appointed. For discussion, see §98.11.

The court has broad discretion to grant or deny late requests, including requests made after the guilt phase trial; at this point, defendant no longer has a constitutional right to self-representation. *People v Valdez* (2004) 32 C4th 73, 101–103, 8 CR3d 271 (motion made shortly before start of jury selection properly denied); *People v Bradford* (1997) 15 C4th 1229, 1365, 65 CR2d 145 (trial court granted request); *People v Bloom* (1989) 48 C3d 1194, 1220, 259 CR 669. However, a self-representation

request made after the penalty phase ended in a hung jury is timely. *People v Halvorsen, supra,* 42 C4th at 434.

The court also has discretion to deal with late requests by a pro per defendant for appointment of counsel. *People v Lawley* (2002) 27 C4th 102, 148, 115 CR2d 614 (request at start of penalty phase trial properly denied).

☛ JUDICIAL TIPS:

- A belated request for self-representation can sometimes be resolved by suggesting that defendant talk it over with counsel and continuing the matter for a day or two. See *People v Silva* (1988) 45 C3d 604, 621, 247 CR 573.
- When a late request is made as a tactic to secure delay, make a finding to that effect on the record. This is not required by California law but will protect the ruling against collateral attack in federal court. See *Moore v Calderon* (9th Cir 1997) 108 F3d 261, 264 (Ninth Circuit considers delay tactic as sole ground for denying late but otherwise proper *Faretta* request).

The right of self-representation does not extend to criminal appeals. *In re Barnett* (2003) 31 C4th 466, 473, 3 CR3d 108.

5. [§98.11] Advisory Counsel

The court has discretion whether to grant a pro per defendant's request for advisory counsel. *People v Crandell* (1988) 46 C3d 833, 861, 251 CR 227; *People v Bigelow* (1984) 37 C3d 731, 742, 209 CR 328. Judicial practice varies widely. Some judges believe that unrepresented defendants take advantage of the system and require a strong showing before granting the request. Others view such an appointment as usually necessary to safeguard defendant's rights and to facilitate proceedings. Some judges suggest to pro per defendants that they accept advisory counsel.

☛ JUDICIAL TIPS:

- Occasionally, a defendant who has tried and failed to have private counsel appointed will reject appointment of the public defender and request both pro per status and private advisory counsel. Many judges would deny this request, considering it to be manipulative. See *People v Crandell, supra.*
- The judge should appoint standby counsel if the request for advisory counsel is denied or not made. See §98.8.

- Some judges appoint an attorney to the dual role of advisory and standby counsel. See, *e.g., People v Lancaster* (2007) 41 C4th 50, 63, 58 CR3d 608.

The court has no authority to appoint the public defender as advisory or standby counsel over that office's objection. *Dreiling v Superior Court* (2000) 86 CA4th 380, 103 CR2d 70; Govt C §27706.

Defendant, not advisory counsel, is in charge of the defense; the court must not let counsel interfere with that control. Counsel's role is what the name implies: to give advice. See, *e.g., People v Bradford* (1997) 15 C4th 1229, 1368, 65 CR2d 145. When defendant and advisory counsel agree, the court may expand counsel's role, *e.g.,* by permitting counsel to examine some of the witnesses. See *People v Hamilton* (2009) 45 C4th 863, 873, 89 CR3d 286 (counsel conducted majority of voir dire, examination, and argument).

☛ JUDICIAL TIP: The judge should explain advisory counsel's limited role to prospective jurors. Otherwise they may misunderstand counsel's silence.

Due process requires that the court not permit advisory counsel to withdraw except after a hearing of which defendant has notice and at which defendant is present and has an opportunity to be heard. *People v Ebert* (1988) 199 CA3d 40, 44, 244 CR 447.

6. [§98.12] Defendant as Co-Counsel

A defendant has no absolute right to act as co-counsel with defense counsel, and such an arrangement is generally undesirable. *People v Barnett* (1998) 17 C4th 1044, 1106, 74 CR2d 121. The court has discretion to let defendant participate in the presentation of the case, but should permit it only on a strong showing that it will promote justice and judicial efficiency, and only if defendant's attorney does not object. *People v Hamilton* (1989) 48 C3d 1142, 1162–1163, 259 CR 701; see California Judges Benchguide 54: *Right to Counsel Issues* §54.33 (Cal CJER) for illustrations of insufficient showings; no decisions mandate co-counsel status in particular circumstances.

☛ JUDICIAL TIPS:

- The decision whether to seek co-counsel status is counsel's, not defendant's (*People v Hamilton, supra,* 48 C3d at 1163). The judge must not grant such a request unless it comes from counsel.
- Some judges recommend that the court give *Faretta* warnings to a defendant who requests co-counsel status.
- Concern that a defendant might become disruptive is not a compelling reason to grant co-counsel status.

- The motion should not be denied merely because defendant has competent counsel. *People v Davis* (1984) 161 CA3d 796, 803, 207 CR 846.
- If the request is denied, reasons for that action should be carefully explained to defendant on the record.

D. Notice of Evidence in Aggravation of Sentence (Pen C §190.3)

1. [§98.13] In General

The prosecution may generally not offer evidence in aggravation of sentence at the penalty phase unless it has given defendant notice of the evidence. Pen C §190.3. See *People v Wilson* (2005) 36 C4th 309, 356, 30 CR3d 513 (victim impact evidence is subject to notice requirement). This notice requirement, unique to capital cases, is designed to assist defendant in preparing the defense of the penalty phase. *People v Smith* (2003) 30 C4th 581, 620, 134 CR2d 1; *Matthews v Superior Court* (1989) 209 CA3d 155, 160, 257 CR 43. Penal Code §190.3 exempts guilt phase and rebuttal evidence from its requirements. The exemption for guilt phase evidence includes penalty phase evidence that has been introduced during the guilt phase to establish guilt (*People v Champion* (1995) 9 C4th 879, 942, 39 CR2d 547) and evidence of the circumstances of the crime. *People v Hughes* (2002) 27 C4th 287, 405, 116 CR2d 401. For the meaning of "circumstances of the crime," see California Judges Benchguide 99: *Death Penalty Benchguide: Penalty Phase and Posttrial* §§99.26–99.30. The exemption for rebuttal evidence extends to evidence introduced on cross-examination of a guilt phase witness that could have been offered on rebuttal. *People v Poggi* (1988) 45 C3d 306, 332, 246 CR 886.

The notice requirement does not replace discovery obligations; defendant can properly make discovery motions to seek supplementary information. *People v Grant* (1988) 45 C3d 829, 854, 248 CR 444. For defendant's obligation to disclose mitigating evidence and the prosecution's reciprocal obligation to disclose its rebuttal evidence, see §98.18. For the prosecution's broad duty to disclose exculpatory evidence, see, *e.g., In re Miranda* (2008) 43 C4th 541, 575, 76 CR3d 172 (death sentence reversed); see also *People v Salazar* (2005) 35 C4th 1031, 1050, 29 CR3d 16; *People v Dickey* (2005) 35 C4th 884, 907–909, 28 CR3d 647. As to the prosecution's duty to disclose evidence that the defendant identifies as mitigating, see *In re Steele* (2004) 32 C4th 682, 700, 10 CR3d 536.

2. [§98.14] Time of Notice

The statute states that notice of evidence in aggravation is to be given "within a reasonable period of time as determined by the court prior to trial." Pen C §190.3.

The words "prior to trial" mean before the case is called for trial of the *guilt* phase. *People v Daniels* (1991) 52 C3d 815, 879, 277 CR 122; see *People v Salcido* (2008) 44 C4th 93, 157, 79 CR3d 54. When the penalty phase is retried, notice can be given before the start of the retrial. *People v Raley* (1992) 2 C4th 870, 905, 8 CR2d 678; *People v Robertson* (1989) 48 C3d 18, 45, 255 CR 631.

☛ JUDICIAL TIP: One experienced prosecutor suggests that courts can best forestall Pen C §190.3 problems by requiring the prosecution to provide written notice immediately upon assignment of the case to the trial court, referencing each incident to an attached police report.

3. [§98.15] Late Notice

It is not uncommon for the prosecution to come upon aggravation evidence at a late stage or to find out that it had overlooked evidence in its files. Delay is not fatal as long as the prosecution acted reasonably and in good faith, and there is no prejudice to the defense. *People v Jennings* (1988) 46 C3d 963, 987, 251 CR 278; *People v Rodrigues* (1994) 8 C4th 1060, 1153, 36 CR2d 235; *People v Cummings* (1993) 4 C4th 1233, 1325, 18 CR2d 796 (evidence not newly discovered but prosecution acted in good faith).

Prejudice in this context means that the delay has affected defense counsel's opportunity to prepare a defense to the aggravating evidence. *People v Howard* (2008) 42 C4th 1000, 1016, 71 CR3d 264 (prejudice to ability to voir dire is not sufficient). When the court has indications of such an effect, the evidence should be excluded; in the absence of prejudice, a continuance, if one is requested and needed, is the normal remedy. *People v Chatman* (2006) 38 C4th 344, 396, 42 CR3d 621; *People v Jennings, supra.*

Even a substantial unexplained delay is not fatal when the defendant neither objected, requested a continuance, or otherwise indicated prejudice from the delay. *People v Taylor* (2001) 26 C4th 1155, 1181–1182, 113 CR2d 827.

☛ JUDICIAL TIPS:

- An accurate statement in an initial timely notice that the investigation is ongoing and that additional information will be provided as it becomes available suggests good faith.
- A continuance is not always necessary. See, *e.g., People v Smith* (2003) 30 C4th 581, 617–620, 134 CR2d 1 (notice near end of guilt phase but witnesses readily available for interviews); *People*

v Daniels (1991) 52 C3d 815, 880 n28, 277 CR 122 (notice given at voir dire; penalty phase months away).

- It is important to differentiate *late* notice from *lack* of notice. In the latter situation, the court must exclude the evidence; in the former, it depends on prejudice. See *People v Carrera* (1989) 49 C3d 291, 335, 261 CR 348 (trial court erred, though not prejudicially in the particular case). However, lack of notice often becomes late notice.

4. [§98.16] Form of Notice

Written notice is preferable and should be the norm, but is not mandated by Pen C §190.3. *People v Smith* (2003) 30 C4th 581, 620, 134 CR2d 1; *People v Miranda* (1987) 44 C3d 57, 97, 241 CR 594.

☛ JUDICIAL TIP: The judge should require written notice and the filing of a copy. Some judges also require that a receipt be signed and filed.

Some prosecutors give notice in the form of or attached to a motion to have the listed evidence ruled admissible. This type of notice has the benefit of encouraging a relatively early determination of what evidence in aggravation is admissible.

5. [§98.17] Contents of Notice

Notice is sufficient if it gives the defendant a reasonable opportunity to prepare a defense. *People v Wilson* (2005) 36 C4th 309, 349, 30 CR3d 513; *People v Arias* (1996) 13 C4th 92, 166, 51 CR2d 770. Notification of the dates, places, and victims of prior offenses is sufficient. *People v Hart* (1999) 20 C4th 546, 639, 85 CR2d 132; *People v Williams* (1997) 16 C4th 153, 234, 66 CR2d 123. The notice need not include the names of witnesses (*People v Hart, supra*; *People v Williams, supra*), at least as long as they are provided as part of discovery before the *guilt* trial starts. *People v Mayfield* (1997) 14 C4th 668, 799, 60 CR2d 1. The defendant is not entitled to a summary of the evidence. *People v Roberts* (1992) 2 C4th 271, 330, 6 CR2d 276.

Boilerplate notice in the language of the statute that defines aggravating factors is inadequate. *People v Roldan* (2005) 35 C4th 646, 733, 27 CR3d 360 (notice that prosecution will rely on circumstances of offense as aggravating factor is not adequate notice of victim impact evidence); *People v Jennings* (1991) 53 C3d 334, 391, 279 CR 780. The availability of discovery may save skimpy notice on appeal. See *People v Grant* (1988) 45 C3d 829, 853–854, 248 CR 444. Actual notice may be provided not only by the statutory notice, but by supplemental information such as police reports. *People v Jenkins* (2000) 22 C4th 900, 1029, 95 CR2d 377.

Notice that the prosecution will offer evidence of specific crimes permits the prosecutor to prove the entire course of conduct related to it (*People v Mendoza* (2000) 24 C4th 130, 185, 99 CR2d 485; *People v Williams, supra*), including offenses that were part of the course of conduct. *People v Jenkins, supra*; *People v Visciotti* (1992) 2 C4th 1, 70, 5 CR2d 495.

☛ JUDICIAL TIPS:

- Judges should try to resolve most disputes concerning notice before setting the case for trial. Attorneys should be advised of this policy early in the case.
- Judges should encourage fairly detailed notice. They need a clear picture of the likely aggravating evidence in order to rule on in limine motions and to plan for and manage the penalty phase of the trial.

6. [§98.18] Defense Disclosure of Mitigating Evidence

Under the reciprocal discovery statute, Pen C §§1054–1054.10, the defense must disclose mitigating evidence it plans to use in the penalty trial. This discovery, like Pen C §190.3 notice, has to be provided before the guilt phase begins. *People v Superior Court* (Mitchell) (1993) 5 C4th 1229, 1233, 23 CR2d 403; see Pen C §1054.7 (requiring disclosure at least 30 days before trial).

However, in order to avoid having advance disclosure jeopardize the defense of the guilt phase, the court may hold an in camera hearing on this matter at the request of the defense and in an appropriate case can defer discovery until completion of the guilt phase. *People v Superior Court* (Mitchell), *supra,* 5 C4th at 1237–1239. For example, the defendant might intend to rely on reasonable doubt as to whether he or she was at the scene of the crime during the guilt phase; however, at the penalty phase, defendant might plan to admit presence and offer witnesses who will place defendant at the scene but testify to mitigating circumstances.

When the defendant discloses witnesses, the prosecution must disclose rebuttal witnesses. *People v Gonzales* (2006) 38 C4th 932, 956, 44 CR3d 237 (reciprocal duty applied to penalty phase).

E. [§98.19] Motion To Strike Prior Murder Special Circumstance Allegation

The motion to strike a prior murder special circumstance allegation, usually made before trial, seeks to strike the prior murder special circumstance alleged under Pen C §190.2(a)(2) on constitutional grounds. Grounds include *Tahl-Boykin* violations, having been under the influence

of drugs when pleading guilty to the earlier charge (*Curl v Superior Court* (1990) 51 C3d 1292, 1304, 276 CR 49), denial of the assistance of counsel at a critical stage of the previous trial (*People v Horton* (Horton II) (1995) 11 C4th 1068, 1136, 47 CR2d 516), or any other constitutional infirmity. The defendant may not make a *Tahl-Boykin* challenge (failure to advise of constitutional rights before guilty plea) to a conviction incurred before *In re Tahl* (1969) 1 C3d 122, 81 CR 577. *People v Seaton* (2001) 26 C4th 598, 677, 110 CR2d 441. The defendant must overcome a strong presumption of constitutional validity. *People v Cunningham* (2001) 25 C4th 926, 1013, 108 CR2d 291; see *People v Marks* (2003) 31 C4th 197, 235, 2 CR3d 252.

A capital case defendant is entitled to raise the constitutional claim even if it was decided adversely to the defense in the appeal of the prior conviction. In short, the earlier determination is *not* a bar to the collateral attack. *People v Horton*, *supra*, 11 C4th at 1139; see *Garcia v Superior Court* (1997) 14 C4th 953, 963, 59 CR2d 858 (although no collateral attacks on grounds of ineffective assistance of counsel are permitted in noncapital cases, such attacks are allowed in capital cases).

"[D]efendant has the burden of proof in establishing the constitutional invalidity of the prior conviction." *Curl v Superior Court, supra,* 51 C3d at 1303. See *People v Curl* (2009) 46 C4th 339, 349–352, 93 CR3d 537 (later U.S. Supreme Court decisions do not shift burden of proof or create right to litigate validity before jury).

The procedures involved in this motion are as follows (see *Curl v Superior Court, supra,* 51 C3d at 1306, 1307):

(1) Defendant must allege facts indicating an actual denial of his or her constitutional rights.

(2) When such allegations are made, the court holds an evidentiary hearing.

(3) At the hearing, the prosecution has the initial burden of producing evidence of the prior murder conviction sufficient to make a prima facie case that defendant suffered that conviction.

(4) Then the burden shifts to defendant to produce evidence that proves the invalidity of the prior conviction.

☛ JUDICIAL TIP: The defendant should be required to produce the transcript of the prior proceedings or to demonstrate its unavailability.

(5) The prosecution may offer rebuttal evidence.

☛ JUDICIAL TIP: Judges should not defer ruling until the guilt phase is under way or completed; the ruling on the motion may significantly affect defense strategy during the guilt phase. See *People v Horton, supra,* 11 C4th at 1140. An early ruling might also facilitate disposition.

F. Mental Retardation Hearing

1. [§98.20] Right to Determination; Application for Hearing

A capital case defendant has the right to a determination whether he or she is mentally retarded. Pen C §1376(b)(1); see *Atkins v Virginia* (2002) 536 US 304, 122 S Ct 2242, 153 L Ed 2d 335 (prohibiting execution of mentally retarded persons).

A defendant asserts this right by filing a pretrial motion for an order for a mental retardation hearing and an expert's declaration that the defendant is retarded. Pen C §1376(b)(1). The declaration must make a prima facie case for relief: it must be by a qualified expert and explain the basis for the assessment of mental retardation in light of the statutory standard. *In re Hawthorne* (2005) 35 C4th 40, 47, 24 CR3d 189; for discussion of statutory standard, see §98.21; for discussion of *postconviction* retardation hearings, see California Judges Benchguide 99: *Death Penalty Benchguide: Penalty Phase and Posttrial* (Cal CJER).

Penal Code §1376 applies to cases pending in the trial court at the time of its enactment. *Centeno v Superior Court* (2004) 117 CA4th 30, 38 n1, 11 CR3d 533.

The court probably has no duty to act in the absence of a defense motion unless the court has a doubt not merely as to defendant's retardation but also as to defendant's *competency* to stand trial. See *People v Romero* (2008) 44 C4th 386, 420, 79 CR3d 334.

2. [§98.21] Meaning of Mentally Retarded

Mentally retarded within the meaning of a determination under Pen C §1376(a) has three elements (Pen C §1376(a)):

1. "[T]he condition of significantly subaverage general intellectual functioning";
2. Concurrent "deficits in adaptive behavior"; and
3. Manifested before the age of 18.

An IQ of 70 is not the upper limit for a showing of retardation. *In re Hawthorne* (2005) 35 C4th 40, 48, 24 CR3d 189. Retardation is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but by assessing the defendant's overall capacity based on considering all relevant evidence. 35 C4th at 49. In accord: *People v Superior Court* (Vidal) (2007) 40 C4th 999, 1012, 56 CR3d 851 (statute does not dictate primary reliance on Wechsler Full Scale IQ test score).

3. [§98.22] Choice and Time of Hearing

Nonjury hearing. The defendant may request a court hearing. Such a hearing is held before the trial. A request for a court hearing waives a jury hearing. Pen C §1376(b)(1).

Jury hearing. When the defendant does not request a court hearing, the jury that heard the guilt phase determines retardation in a separate hearing held between the guilt and the penalty phases. Pen C §1376(b)(1). See *People v Superior Court* (Vidal) (2007) 40 C4th 999, 1004 n2, 56 CR3d 851.

☛ JUDICIAL TIP: Order a jury hearing unless defendant expressly requests a court hearing.

A hung jury necessitates a retardation hearing before a new jury; if it finds that the defendant is not retarded, the jury that heard the guilt phase also hears the penalty phase. Pen C §1376(b)(3).

For discussion of posthearing proceedings, see §§98.25–98.28.

4. [§98.23] Issue; Burden and Order of Proof; Argument

In a hearing under Pen C §1376, the sole issue is whether the defendant is mentally retarded. Pen C §1376(b)(2). Evidence of the underlying crimes is admissible only to the extent relevant to this question. *In re Hawthorne* (2005) 35 C4th 40, 50, 24 CR3d 189. The court is not bound by the opinions of the experts. 35 C4th at 50.

☛ JUDICIAL TIP: Do not combine a §1376 hearing with one to determine competence to stand trial or sanity. As to the relation between retardation and sanity determination, see §98.29.

The issue is present retardation, not defendant's mental capacity at the time of the offense. *Campbell v Superior Court* (2008) 159 CA4th 635, 653, 71 CR3d 594. The defendant has the burden of proving mental retardation by a preponderance of the evidence. Pen C §1376(b)(3); *In re Hawthorne, supra,* 35 C4th at 50. The order of proof probably is defendant-prosecution and the order of argument prosecution-defendant. Pen C §1376(b)(2), (3).

5. [§98.24] Court-Appointed Experts

The court may make orders needed to ensure the production of evidence sufficient to determine the retardation issue, including the appointment of experts to examine the defendant. Pen C §1376(b)(2). The defendant must also submit to an examination by a prosecution expert. *Centeno v Superior Court* (2004) 117 CA4th 30, 39–41, 11 CR3d 533; see *In re Hawthorne* (2005) 35 C4th 40, 45, 50, 24 CR3d 189.

The defendant's statements during such a court-ordered examination are inadmissible in the guilt phase of the trial. Pen C §1376(b)(2). The statute does not block admission of these statements during the penalty phase.

6. Posthearing Matters

a. [§98.25] Jury Not Informed

When the mental retardation hearing was by the court, the jury is not informed of the hearing or its outcome. Pen C §1376(c). This prohibition applies whether or not the court found defendant to be retarded. Pen C §1376(c)(1), (2).

☛ JUDICIAL TIP: Immediately after announcing your findings, remind and instruct counsel accordingly.

b. [§98.26] Proceeding After Court Finding of Retardation

After a court finding that the defendant is mentally retarded, the trial proceeds as in any case in which the prosecution does not seek the death penalty. If the defendant is convicted of first degree murder and at least one special circumstance is found true, the court imposes a sentence of life imprisonment without possibility of parole. Pen C §1376(c)(1).

c. [§98.27] Proceedings After Court Finding of No Retardation

After a finding by the court that the defendant is not mentally retarded, the court proceeds as in any other capital case. Pen C §1376(c)(2).

d. [§98.28] Proceedings After Jury Determination

When the jury finds that defendant is mentally retarded, the court imposes an LWOP sentence. Pen C §1376(d)(1). When the jury finds that defendant is not retarded, the case proceeds to the penalty phase like any other capital case. Pen C §1376(d)(2). For proceedings in the event of a hung jury, see §98.22.

7. [§98.29] Relation to Sanity Trial

A defendant who pleads not guilty by reason of insanity may also seek a jury hearing on retardation. Because a finding of insanity obviates the need for such a hearing, it is scheduled after the sanity trial and held only if the defendant is found sane. Pen C §1376(e).

☛ JUDICIAL TIP: When the defendant requests a *nonjury* hearing to determine retardation, it should still be held before the guilt phase of the trial, unless counsel stipulate otherwise.

G. [§98.30] Checklist: Trial Setting Conference

(1) *Ask counsel to outline the case briefly.* Many judges believe that successful management of a capital case is enhanced by a conference between court and counsel at the time a trial date is assigned. In some counties, this will be the judge's first opportunity to see counsel and learn about the case.

☛ JUDICIAL TIP: The conference should be conducted in open court, on the record, and in the presence of defendant. See Pen C §190.9.

(2) *Ask the prosecutor if he or she will seek the death penalty.* This is a crucial item of information in planning for the trial.

☛ JUDICIAL TIP: When the prosecutor is uncertain, a trial date should not be assigned. Some judges, however, prefer to set a trial date as a safeguard against violating speedy trial requirements.

(3) *Inquire whether the case can be disposed of without trial.* Most judges do not regard such an inquiry as improper plea bargaining. In fact, an inquiry along these lines is mandatory at a readiness conference. Cal Rules of Ct 4.112. Some judges ask the prosecutor whether he or she would agree to an imprisonment for life without possibility of parole (LWOP) plea. Other judges believe that this comes too close to plea bargaining.

☛ JUDICIAL TIPS:

- Cases particularly suitable for inquiry about LWOP are drug-related murders, gang payback killings, felony murders with a single victim, and others for which the case outline suggests that a death verdict is not very likely.
- In discussing disposition and other matters, judges should remember that relations between defendant and defense counsel may be fragile and, whenever possible, should avoid straining them. Some judges will not take up disposition in the presence of defendant except at the invitation or with the consent of defense counsel.
- If the parties request a continuance to consider disposition, judges should strongly consider granting the request.

(4) *If the parties agree to a disposition, take the appropriate change of plea. Proceed to step (5) unless there is a continuance or plea change.*

(5) *Ascertain whether discovery has been completed and, if not, what remains to be done.* Judges should determine the effect of incomplete discovery on setting a trial date and should consider setting discovery completion date(s). Judges should also check whether prosecution has given Pen C §190.3 notice (see §§98.13–98.17) and whether motions concerning Pen C §190.3 compliance have been resolved.

☛ JUDICIAL TIP: While incomplete discovery may cause a setting delay, counsel's anticipated motions on the admissibility of discovered evidence should *not* prevent assigning a trial date. Evidentiary motions can be heard between the time of the trial setting conference and the start of trial.

(6) *Determine whether the case is ready to be set for trial or whether there are other matters, such as incomplete investigation, that indicate that setting might be premature.* If it is determined that the case is not ready, the parties should be given a new setting conference date; otherwise, proceed to step (7).

(7) *Obtain counsel's estimates of the length of the trial and formulate your own.*

(8) *Schedule trial date and pretrial conference after discussion of possible dates with counsel.*

☛ JUDICIAL TIP: In blocking out sufficient time, the judge should consider the necessity of reserving one or two weeks immediately before the start of jury selection to deal with motions and of scheduling a similar period between the guilt phase (usually the longest part of the trial) and the penalty phase in order to give jurors a rest and to deal with any motions that may come up at that point.

(9) *Consider explaining your continuance policy at this point.*

☛ JUDICIAL TIP: Judges often balance forbearance about pushing counsel to trial in a capital case with relative firmness about continuing a trial once it has been scheduled. Some judges explain to counsel at this stage that the court will normally not continue the trial to permit writ review of motion rulings.

(10) *Determine what motions are likely to be made (often, there will be a great many as the trial date approaches).* Some judges endeavor to set up a schedule. Others recognize that this may be feasible for some motions, but that, in the normal course of events, many will be filed shortly before trial. To make this manageable, many judges suggest:

- Scheduling a pretrial conference at which motions will be heard one to two weeks before the trial date. For discussion of the pretrial conference, see §§98.31–98.32.
- Setting cut-off dates for filing motions and responses so that counsel and court will have adequate time to study them. Judges should be prepared to make exceptions.

For motions to prohibit the prosecution from seeking the death penalty based on international law, see *Death Penalty Benchguide: Penalty Phase and Posttrial* §§99.161–99.162; also see Pen C §834c.

(11) *Advise counsel about plans for using a jury questionnaire.*

☛ JUDICIAL TIP: Many judges inform the attorneys before the conference about the questionnaire and take up suggested additions at the conference. Doing this at trial setting (or soon thereafter) allows ample time to reproduce the questionnaire. For further discussion of the jury questionnaire, see §98.34.

(12) *Inform counsel whether to submit proposed voir dire questions in writing and, if so, when.* See Cal Rules of Ct 4.200(b).

☛ JUDICIAL TIP: Counsel should be instructed to exchange, discuss, and endeavor to resolve disagreements concerning proposed questions before the pretrial conference (see §§98.31–98.32). The judge should rule on disputes at that conference.

(13) *Discuss any special needs that counsel might have in terms of courtroom equipment or personnel, such as interpreters, amplifying or recording equipment, overhead projectors, etc.* It is easier to make arrangements well in advance of trial than just before it.

(14) *Make a minute order embodying the determinations made at the conference and have the clerk supply each counsel with a copy.*

(15) *Advise the clerk:*

- *How many prospective jurors will be called* (see §98.33);
- *Whether a jury questionnaire will be used and, if so, what its contents will probably be;*
- *If there are any special needs* (see (13) above).

III. PRETRIAL CONFERENCE AND JURY SELECTION

A. Pretrial Conference

1. [§98.31] Functions and Scheduling

The pretrial conference combines the functions of a readiness conference (Cal Rules of Ct 4.112), pre-voir dire conference (Cal Rules of Ct 4.200), and motion scheduling conference. The date should be assigned

at the trial setting conference. The pretrial conference is often held one to two weeks before jury selection begins. See §98.30(8). Some judges hold a separate readiness conference about three weeks before the trial date to ascertain whether the trial will in all likelihood proceed on schedule. See checklist in §98.32.

2. [§98.32] Checklist

(1) *Inquire whether the case or any particular charge can be disposed of without trial.* Cal Rules of Ct 4.112(a).

(2) *Inquire whether the prosecutor will seek the death penalty.*

(3) *Inquire whether the prosecutor will proceed on all charged special circumstances.*

(4) *If one charge on which the prosecutor plans to proceed is a prior first or second degree murder conviction* (Pen C §190.2(a)(2)), *discuss how to sanitize this matter during jury selection and during the guilt phase.*

☛ JUDICIAL TIP: A good way to sanitize priors is (i) to inform the prospective jurors only that defendant is charged with an unspecified special circumstance, and (ii) to prohibit references to it until the guilt phase is concluded.

(5) *Obtain the names of witnesses each side is likely to call during the guilt phase.* Cal Rules of Ct 4.200(a)(2). Although defendant may be uncertain, counsel should provide a list of potential witnesses.

(6) *Decide the order in which all remaining pretrial motions will be heard and set them for hearing.*

☛ JUDICIAL TIPS:

- Motions should be studied before the conference.
- Judges should make a preliminary determination as to which motions are likely to be fairly time consuming.
- Judges should consider scheduling any remaining discovery-related motions early to reduce the risk of a trial continuance.

(7) *Ascertain whether discovery, aside from matters covered by pending motions, has been completed.* (Some discovery by the defense may have to be deferred. See §98.18.)

☛ JUDICIAL TIP: Judges should stress the need for cooperation between counsel to avoid discovery-related surprises during trial.

(8) *Discuss jury selection details with counsel, including:*

- *Jury questionnaire* (see §98.34).
  - — Any last minute modifications?

— When and how will counsel obtain completed copies?

- *Hardship excuses* (see §98.36).
- *Sequence of selection process* (see §98.35).
- *Voir dire by counsel* (see §98.38).
- *Sequestered voir dire* (see §98.37).
- *Number of alternates.*
- *Calling jurors by number rather than by name.* This practice is disfavored, although lawful, as long as the attorneys receive juror information. *People v Goodwin* (1997) 59 CA4th 1084, 1091, 69 CR2d 576 (practice dehumanizes jurors).
- *Access to jurors' personal identification information.* See *Erickson v Superior Court* (1997) 55 CA4th 755, 64 CR2d 230 (preverdict access cannot be prohibited by local rule); CCP §237.
- *Let counsel know the ground rules.* In addition to the court's customary ground rules, policies particularly helpful in capital cases include:
  - — *No off-the-record discussions*. See §98.4(3).
  - — *Stipulations re challenges for cause.* When counsel receive completed jury questionnaires, the court should ask them to stipulate to as many challenges for cause as possible *before* any individual voir dire.
  - — *Ground rules on counsel voir dire*. For suggested ground rules, see §98.38.
  - — *Daily witness list.* At the start of each trial day, the judge should require counsel to give the court and opposing counsel a list of witnesses to be called that day, together with a time estimate of their respective direct testimonies. This allows the judge to advise jurors and court personnel when a day is likely to be short and reduces the risk of suddenly being informed that a side is out of witnesses. Some judges believe they lack authority to require such a list, but encourage counsel to provide one by suggesting that without one the court would look unfavorably on witness-unavailability problems that might arise.
  - — *Multiple attorneys.* Counsel should be informed that the court will hear from only one attorney per party per witness and that this policy will apply to examination, objections, and other matters.
  - — *Ground rules on juror questions, if the court permits them.* Some judges permit jurors to ask questions of witnesses. Such

questions should be in writing, addressed to the court, and screened by court and counsel. *People v Cummings* (1993) 4 C4th 1233, 1305, 18 CR2d 796. Some judges ask questions that survive the screening process themselves. It is also permissible to let counsel for the side that called the witness ask the questions. *People v Majors* (1998) 18 C4th 385, 407, 75 CR2d 684.

(9) *Advise counsel of the hours and days during which the court will be in session and of any days during which there will be no session.*

☛ JUDICIAL TIP: Determine whether counsel will need any time off during the trial for personal matters and accommodate reasonable requests made in advance.

(10) *Discuss and rule on any request for sequestration.* Sequestration is expensive (though possibly less expensive than a change of venue) and very difficult for jurors.

(11) *Discuss and rule on any media requests.*

(12) *Discuss other matters that the court customarily considers at a pretrial conference.*

B. [§98.33] Number of Prospective Jurors To Be Called

In a single defendant death penalty trial with four alternate jurors, the court will need a minimum of 64 prospective jurors *after* hardship excuses and challenges for cause:

12 trial jurors
20 peremptory challenges—prosecution
20 peremptory challenges—defense
4 alternate jurors
4 peremptory challenges to alternates—prosecution
4 peremptory challenges to alternates—defense

64

To provide a margin of safety, some judges suggest that the 64 minimum be increased to 75. Many judges start with a panel of 150 to 225 prospective jurors and increase that number in a multiple defendant or high publicity case.

C. [§98.34] Checklist: Jury Questionnaire

(1) *Adopt questionnaire several weeks before trial date.* See sample forms in §§98.100–98.101. For questions that apply to criminal trials generally, see Standards of Judicial Administration §4.30.

☛ JUDICIAL TIPS:

- Judges find that the use of jury questionnaires substantially shortens the jury selection process and widely use them in death penalty cases. Oral voir dire, whether by judge or counsel, may be largely limited to clarifying unclear or incomplete questionnaire responses. The availability of written answers also facilitates stipulations concerning challenges for cause. See §98.32(8).
- Judges should guard against ambiguous questions, such as asking about beliefs that would "prevent or make it very difficult" to impose the death penalty. An affirmative answer does not support a challenge for cause, even with an added statement opposing capital punishment. See §98.42.
- In developing a questionnaire, judges should guard against questions that unnecessarily intrude on privacy. A useful guideline is to include only questions that would be allowed on oral voir dire. See *People v Fuentes* (1991) 54 C3d 707, 720 n8, 286 CR 792.

(2) *Rule on questions suggested by counsel.* The parties have a statutory right to submit proposed questions. CCP §223.

(3) *Decide whether to include a brief neutral factual statement.* If so, one may be drafted jointly with counsel. See sample form in §98.102; see also §98.44. Some judges regard such a statement as an aid to jury selection, especially in high publicity cases, but most judges do not include one in the questionnaire.

☛ JUDICIAL TIP: Some judges prefer "mini-opening statements" by the attorneys before hardship questioning to a neutral summary in the questionnaire. Such opening statements should be limited to a few minutes.

(4) *Give the final version to the clerk in ample time for reproduction.*

(5) *Instruct prospective jurors on completing the questionnaire.* See §98.35(4). Some courts request jurors to complete it in the jury assembly room before coming into the courtroom.

☛ JUDICIAL TIP: Jurors should be advised that the completed questionnaires are public records and that they need not give written responses that they regard as particularly sensitive. This advice can be included in the questionnaire (sample forms §§98.100–98.101) or given verbally. See *People v Brasure* (2008) 42 C4th 1037, 1051, 71 CR3d 675; *Bellas v Superior Court* (2000) 85 CA4th 636, 639, 102 CR2d 380.

(6) *Direct the clerk to make sure that sufficient copies of the completed questionnaires are promptly reproduced and made available to counsel and court.*

(7) *Schedule voir dire so that court and counsel have time to study the questionnaire responses.* See §98.35(5). Many judges allow an interval of three to four days, including a weekend.

(8) *Direct the clerk to retain completed questionnaires for inclusion in the record on appeal. People v Heard* (2003) 31 C4th 946, 969, 4 CR3d 131 ("all juror questionnaires must be scrupulously maintained"); Cal Rules of Ct 8.610(a).

D. [§98.35] Sequence of Selection Process

Death penalty trials are hard on everyone involved. They are particularly hard on jurors because of their length and the nature of the decision the jury is asked to make. Experienced judges regard it as very important to have the concerns and reasonable needs of jurors in mind at all times, beginning with the selection process.

☛ JUDICIAL TIPS: Judges should:

- Keep the jurors thoroughly informed at all stages, especially in the initial explanations.
- Maintain a low-keyed, courteous, professional attitude.
- Take recesses when things get unduly tense.
- Invite jurors to indicate when they need a break.
- Work hard to stick to the schedule announced to the jurors. Explain when this is not possible, preferably in advance.
- Minimize interruptions for side bar and chambers conferences; limit chambers conferences to the beginning or end of a session and inform counsel of this policy.
- When a side bar discussion is needed, ensure that defendant can hear it. See §98.37. When that cannot be ensured, take up the matter in open court or during a break. Some judges do not permit side bar discussions during jury selection.
- Look for signs of stress, such as irritability and inattentiveness, in jurors, counsel, parties, witnesses—and in themselves.

There is no "best" way to obtain a jury in a capital case. The following sequence is used by several judges.

(1) *The clerk provides counsel and the court with a randomized list of prospective jurors who will ultimately be called in the order listed.*

☛ JUDICIAL TIP: Judges should obtain a stipulation to use a randomized list.

(2) *Hardship-qualify the prospective jurors as a group*. See §98.36. Taking this step at the outset substantially reduces the number of jury questionnaires to be completed, reproduced, and reviewed.

(3) *Give a thorough orientation talk to the remaining prospective jurors.*

☛ JUDICIAL TIPS: This should be an extensive, well prepared presentation. Some judges draft it in advance. For an illustration, see sample form in §98.103. Counsel should be given an advance copy of any written presentation.

(4) *Have the clerk give the questionnaire to prospective jurors who are not excused for hardship.* Jurors should be instructed to complete it before they leave the courthouse and return it to the appropriate clerk.

☛ JUDICIAL TIP: The prospective jurors should be sworn before filling out the questionnaires. *People v Lewis* (2001) 25 C4th 610, 630, 106 CR2d 629.

(5) *Instruct prospective jurors to return at a specified time, either at a morning or afternoon session.* The judge should determine with counsel at pretrial how many jurors will be examined at each session.

☛ JUDICIAL TIPS:

- With use of a questionnaire, some judges believe that eight or more jurors can be examined per session.
- The juror return dates should be assigned by the clerk. Each juror should be given a slip with the date and time; the slips should be prepared in advance.
- The first return date should be several days after the initial appearance of the jurors as a group, in order to permit reproduction, distribution, and study of the completed questionnaires. See §98.34(7).
- It is good practice to admonish prospective jurors before they leave the courtroom not to discuss the case, read or listen to media or internet accounts, or visit the scene of the crime. See *People v Weaver* (2001) 26 C4th 876, 909, 111 CR2d 2.

(6) *Obtain and provide counsel with copies of the completed questionnaires.*

(7) *At the start of each session, obtain stipulation from counsel on the record of any challenge for cause on which they agree.* See *People v Ervin* (2000) 22 C4th 48, 78, 91 CR2d 623 (stipulation procedure benefits all

parties by substantially expediting jury selection process). In accord: *People v Benavides* (2005) 35 C4th 69, 87–89, 24 CR3d 507.

(8) *Examine jurors.* See §98.38 for voir dire by counsel.

(9) *Hear challenges for cause.* All proper challenges for cause are exercised at this time, not merely those related to death qualification.

☛ JUDICIAL TIP: Consider giving the jurors a break every 45 minutes or so; hear and rule on challenges at that time.

(10) *Provide a single return date to prospective jurors who have not been challenged for cause.* Returning jurors are seated in their order on the randomized jury list.

(11) *Hear peremptory challenges without further voir dire.*

(12) *Replace each challenged juror by the next one on the random list until 12 jurors have been qualified.*

(13) *Qualify alternate jurors in the same manner.*

E. [§98.36] Hardship Excuses

The bases for hardship excuses are the same in capital cases as in others; the number of such excuses is usually much higher. Some judges use a one-page hardship questionnaire (separate from the jury questionnaire); others deal with hardship claims entirely orally.

☛ JUDICIAL TIPS: Many judges explain the limited grounds for hardship excuses in quite strict terms but grant them fairly generously. It is important to handle these matters so that prospective jurors don't easily learn from others what "works." To achieve this goal, some judges use a written form; others achieve this purpose by sequestered questioning of prospective jurors on hardship claims. Sequestered questioning on hardship is used even by judges who otherwise regard sequestered voir dire as prohibited by statute (see §98.37).

Inadequate compensation of jurors and resulting hardship excuses in death penalty cases occasionally lead to claims that the jury is unrepresentative or will be unless jurors are paid more. Courts have not been sympathetic. See, *e.g., People v Carpenter* (1999) 21 C4th 1016, 1035, 90 CR2d 607; *People v DeSantis* (1992) 2 C4th 1198, 1215, 9 CR2d 628.

F. Voir Dire Procedure

1. [§98.37] Sequestered or in Presence of Other Jurors?

For a decade "*Hovey* voir dire" was a widely used term of art in capital case jury selection. It refers to the requirement of *Hovey v Superior Court* (1980) 28 C3d 1, 168 CR 128, that the death-qualifying part of voir dire be conducted individually and in sequestration. In 1990, voters

enacted CCP §223 as part of Proposition 115, providing that voir dire must occur in the presence of the other jurors, when practicable, in all criminal cases, including death penalty cases. See *People v Brasure* (2008) 42 C4th 1037, 1050, 71 CR3d 675.

Judges retain discretion to permit individual sequestered voir dire; discretion is abused when large group voir dire is insufficient to test prospective jurors for bias or partiality. *People v Tafoya* (2007) 42 C4th 147, 168, 64 CR3d 163 (no abuse when trial judge determined that voir dire in small groups would elicit more candid responses than in large ones). Discretion is not abused when the defendant offered only generalized reasons for individual voir dire, not specific to his case. *People v Burney* (2009) 47 C4th 203, 241, 97 CR3d 348.

Group voir dire is not impractical when it results in potential rather than actual bias. *People v Lewis* (2008) 43 C4th 415, 494, 75 CR3d 588 (16 prospective jurors changed answers after being educated during voir dire process; there was no abuse of discretion to deny individual voir dire). The same is true when each prospective juror completed an extensive questionnaire that included the juror's views on the death penalty. *People v Brasure*, *supra*, 42 C4th at 1051; *People v San Nicolas* (2004) 34 C4th 614, 632, 21 CR3d 612; *People v Waidla* (2000) 22 C4th 690, 713, 94 CR2d 396.

☛ JUDICIAL TIPS:

- Do not deny a request for sequestered individual voir dire out of hand; exercise your discretion on the record. See *Covarrubias v Superior Court* (1998) 60 CA4th 1168, 1182, 71 CR2d 91.
- If a *Hovey* voir dire is used, all prospective jurors other than the one being examined must be excluded; it does *not* mean excluding the media and the public who have as much right to be present at this stage of the trial as at any other. *Ukiah Daily Journal v Superior Court* (1985) 165 CA3d 788, 791, 211 CR 673; see *Press Enter. Co. v Superior Court* (1984) 464 US 501, 104 S Ct 819, 78 L Ed 2d 629.
- One reasonable approach is the use of group voir dire with a shift to individual voir dire with inquiry by counsel when a juror makes an affirmative response to a group inquiry involving a sensitive matter, such as a death-qualifying question. *People v Tafoya, supra* (judge held sequestered voir dire at request of counsel when prospective juror expressed concerns regarding death penalty); *People v Jurado* (2006) 38 C4th 72, 101, 41 CR3d 319 (judge held sequestered voir dire of prospective jurors who expressed strong views on death penalty in questionnaire).

- To facilitate questioning at side bar, the judge should make certain that the courtroom has the electronic equipment necessary to enable the defendant and the court reporter to hear from where they are seated.
- The risk of contamination can be reduced by ruling on potentially prejudicial questions before voir dire starts. See, *e.g.*, *People v Barnett* (1998) 17 C4th 1044, 1131–1132, 74 CR2d 121 (trial judge prohibited reference to most of defendant's many aliases).

2. [§98.38] Questioning by Counsel

Under CCP §223 in a criminal case:

- The court conducts the initial examination of prospective jurors.

☛ JUDICIAL TIPS:

— Phrase questions simply and clearly. See *People v Heard* (2003) 31 C4th 946, 959–968, 4 CR3d 131 (vague answers to unclear questionnaire questions do not support challenge for cause; death sentence reversed).

— Telling jurors that LWOP means exactly what it says helps overcome the common misconception that LWOP prisoners do not serve out their sentences. See *People v Ledesma* (Ledesma II) (2006) 39 C4th 641, 666, 47 CR3d 326.

— Do not refer to appellate procedures. See *People v Moon* (2005) 37 C4th 1, 18, 32 CR3d 894.

- Counsel for each party has the right to orally question all of the prospective jurors. See also Cal Rules of Ct 4.201.

Code of Civil Procedure §223 limits attorney voir dire in two respects:

(1) Questioning may be conducted only to aid the exercise of challenges for cause. *People v Mendoza* (2000) 24 C4th 130, 168 n5, 99 CR2d 485. Questions about membership in a particular religious denomination are relevant because the answers may indicate a potential bias that requires further exploration. *People v Williams* (2006) 40 C4th 287, 308, 52 CR3d 268 (but refusal to permit such questions not error when there is extensive inquiry by court and counsel into prospective jurors' attitudes toward death penalty).

☛ JUDICIAL TIP: Minimize inquiry on this topic. Most denominations do not have an official stand on the death penalty.

(2) The court may limit questioning and impose time limits. See *People v Carter* (Carter II) (2005) 36 C4th 1215, 1249–1252, 32 CR3d 838 (no error in giving each side 60 minutes to voir dire 20 prospective

jurors; counsel could additionally give judge follow-up questions related to questionnaire answers).

☛ JUDICIAL TIP: Allow counsel some latitude. Jurors respond differently to judges than attorneys. A juror's interplay with counsel is often crucial to counsel's evaluation of a prospective juror.

Most judges prefer a single voir dire, rather than voir dire on attitudes toward capital punishment followed later by questioning on other possible bases for a challenge for cause.

☛ JUDICIAL TIPS: Ground rules on voir dire should be discussed at pretrial. Common limitations are: (1) questions should be primarily aimed at clarifying responses to questionnaire or to judge's oral questions, (2) there should be no voir dire based on anticipated evidence in the case before the court (see §98.44), and (3) there should be no hypotheticals in an effort to rehabilitate a juror who is dubious about imposing or eager to impose the death penalty. See discussion in §98.46. For other impermissible questions, see Standards of Judicial Administration §4.30(c). Some judges impose time limits, while others tell counsel that the voir dire of all jurors called each day will be completed that day, no matter how late the court has to stay in session.

Discharge without voir dire. The trials in cases condoning this practice under limited circumstances (*e.g.*, *People v Thompson* (2010) 49 C4th 79, 96, 109 CR3d 549; *People v Wilson* (2008) 44 C4th 758, 787, 80 CR3d 211; *People v Avila* (2006) 38 C4th 491, 527–533, 43 CR3d 1) took place before CCP §223 was recast to give counsel in criminal cases the right to voir dire.

☛ JUDICIAL TIP: Get a stipulation. Without one, permit voir dire. You have adequate authority to keep it within bounds.

G. Death Qualification

1. [§98.39] *Witherspoon-Witt*

At one time general opposition to capital punishment was a ground to challenge a prospective juror for cause only if it was unmistakably clear that these views would keep the juror from making an impartial decision as to guilt or would cause the juror to vote automatically against imposition of the death penalty, regardless of the evidence. *Witherspoon v Illinois* (1968) 391 US 510, 88 S Ct 1770, 20 L Ed 2d 776 ("*Witherspoon* standard").

The current standard treats views on capital punishment—pro or con—much like other juror beliefs that might affect their decisions. A challenge for cause is proper only if a juror's views on capital punishment would "prevent or substantially impair" the juror's ability to be neutral and to follow the judge's instructions. *Wainwright v Witt* (1985) 469 US 412, 424, 105 S Ct 844, 83 L Ed 2d 841 ("Witt standard"); *People v Martinez* (2009) 47 C4th 399, 425, 97 CR3d 732; *People v Cooper* (1991) 53 C3d 771, 809, 281 CR 90 (*Witt* standard applies retroactively).

The key question is whether a juror's capital punishment views would substantially impair her or his ability to return a sentence of LWOP or death in the case before the juror. *People v Heard* (2003) 31 C4th 946, 958–959, 4 CR3d 131; *People v Ochoa* (1998) 19 C4th 353, 443, 79 CR2d 408. In other words, the test under *Witt* is whether the juror would invariably vote for or against the death penalty regardless of the aggravating or mitigating circumstances. *People v Kirkpatrick* (1994) 7 C4th 988, 1055, 30 CR2d 818. For guidelines, see §§98.42–98.46. Application of the test often involves an assessment of a prospective juror's demeanor and credibility. *People v Salcido* (2008) 44 C4th 93, 133, 79 CR3d 54.

☛ JUDICIAL TIPS:

- Ask yourself whether you have the definite impression that a prospective juror would be unable to apply the law impartially. See *Martinez*, *supra*, 47 C4th at 425.
- If you have such a definite impression, say so on the record and if you do not, say that also. See §98.49.
- It is sometimes useful to describe the demeanor of a prospective juror when it affects your decision. See §98.49.

2. [§98.40] Defense Challenges to Selecting Death-Qualified Jurors for Guilt Phase

A number of studies indicate that death-qualified juries may be more prone to convict than those from which strong opponents of capital punishment have not been excluded. See *Lockhart v McCree* (1986) 476 US 162, 173–175, 106 S Ct 1758, 90 L Ed 2d 137. For that reason, the defense often challenges (typically by in limine motion) selection of a death-qualified jury for the trial of the guilt phase, claiming that it violates defendant's right to a jury drawn from a fair cross-section of the community.

This claim has repeatedly been denied. Courts have held that even if the studies are valid, the fair-cross-section principle does not create a right to a jury that includes death penalty opponents. *People v Howard* (2010) 51 C4th 15, 26–27, 118 CR3d 678; *People v Mills* (2010) 48 C4th 158,

172, 106 CR3d 153 (even if social science evidence now shows conclusively that death-qualified juries are more prone to convict, death qualification is not constitutionally prohibited); see, *e.g., People v Lenart* (2004) 32 C4th 1107, 1119–1121, 12 CR3d 592 (motion to empanel nondeath-qualified jury for guilt phase and death-qualified one for penalty phase properly denied); *People v Ashmus* (1991) 54 C3d 932, 956, 2 CR2d 112 (in limine motion to prevent exclusion, for guilt phase, of persons who could try that phase fairly).

☛ JUDICIAL TIP: Despite these rulings, motions in this area should be expected. They need not consume more than a few minutes but should not be treated as frivolous. Experienced defense attorneys often believe that competence-of-counsel standards require them to make such and other seemingly hopeless motions as a precaution in case the applicable rule changes.

The prosecutor may properly use peremptory challenges to eliminate prospective jurors who do not wholeheartedly support the death penalty. *People v Bonilla* (2007) 41 C4th 313, 346–349, 60 CR3d 209; *People v Avila* (2006) 38 C4th 491, 557, 43 CR3d 1.

3. [§98.41] Death Penalty Supporters

The *Witt* standard and the *Witherspoon-Witt* voir dire were developed mainly in the context of death penalty opponents, but they apply equally to its supporters. *Morgan v Illinois* (1992) 504 US 719, 112 S Ct 2222, 119 L Ed 2d 492; *People v Heard* (2003) 31 C4th 946, 959, 4 CR3d 131; *People v Champion* (1995) 9 C4th 879, 908, 39 CR2d 547.

Accordingly, it is important to inquire into attitudes that favor capital punishment as well as opposition to it. *Morgan v Illinois, supra; People v Champion, supra*.

☛ JUDICIAL TIP: General questions about a juror's ability to be fair and impartial are *not* adequate substitutes for inquiry into the views of prospective jurors about imposing a death sentence. *Morgan v Illinois, supra*. Some judges and attorneys have observed that death penalty supporters tend to be less forthcoming about their views than opponents; voir dire needs to be tailored accordingly.

4. Guidelines

a. [§98.42] Personal Opposition to Death Penalty

Personal opposition to the death penalty does not disqualify a juror even if it may "predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase . . . , unless that

predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." See *People v Kaurish* (1990) 52 C3d 648, 699, 276 CR 788. "[A] prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or would make it very difficult for the juror ever to impose the death penalty." *People v Stewart* (2004) 33 C4th 425, 447, 15 CR3d 656; see *People v Martinez* (2009) 47 C4th 399, 427, 431, 97 CR3d 732 (such views are not disqualifying as long as prospective juror makes it clear that he or she is willing to temporarily set them aside in deference to rule of law).

☛ JUDICIAL TIP: Apply the same principles to death penalty supporters. See §98.41.

b. [§98.43] Willingness To Consider Imposition of Death Penalty

The issue is not whether "a prospective juror could simply consider imposing the death penalty" (or LWOP), but whether the juror is able to consider it "as a reasonable possibility." *People v Ashmus* (1991) 54 C3d 932, 963, 2 CR2d 112; *People v Martinez* (2009) 47 C4th 399, 427–433, 97 CR3d 732 (prospective juror was asked if it was realistic to suppose she would vote for the death penalty, and she responded that it was realistic that she could but not that she would; disqualification for cause upheld). *E.g., People v Martinez, supra,* 47 C4th at 442 ("I could change my mind"); *People v McDermott* (2002) 28 C4th 946, 982, 123 CR2d 654 (juror Hilyard B.); *People v Slaughter* (2002) 27 C4th 1187, 1216–1218, 120 CR2d 477; *People v Weaver* (2001) 26 C4th 876, 912, 111 CR2d 2. Nevertheless, "(t)he same legal standard governs the inclusion or exclusion of a prospective juror." *People v McDermott, supra,* 28 C4th at 981. See *People v Boyette* (2002) 29 C4th 381, 417–418, 127 CR2d 544 (strong pro-death juror, who said he could impose a life term if he thought it appropriate, but would have to be convinced, and that multiple murders should automatically get death, disqualified).

c. [§98.44] No Voir Dire Based on Evidence To Be Presented

Witherspoon-Witt voir dire seeks only to ascertain the views of prospective jurors about capital punishment *in the abstract;* the inquiry is directed to whether, *without knowing the facts of the case,* the juror has an open mind on the penalty determination. *People v Clark* (1990) 50 C3d 583, 597, 268 CR 399 (proper to preclude questions about jurors' attitudes based on evidence to be offered at trial); *People v Fields* (1983) 35 C3d 329, 358 n13, 197 CR 803 (excluding juror who would vote against death

penalty in light of defense conjecture that prosecution case will rest entirely on circumstantial evidence would be improper).

But either party may ask prospective jurors whether they would invariably vote for or against death because of one or more circumstances likely to be present in the case because a juror with such a bias may be challenged for cause. *People v Cash* (2002) 28 C4th 703, 718–723, 122 CR2d 545 (death sentence reversed because defense kept from inquiring about effect of prior murder); *People v Ochoa* (2001) 26 C4th 398, 431, 110 CR2d 324 (prosecution may ask whether juror could impose death penalty on defendant who did not personally kill victim); *People v Ervin* (2000) 22 C4th 48, 69–71, 91 CR2d 623 (prosecutor outlined murder-for-hire theory). See *People v Taylor* (2010) 48 C4th 574, 634–637, 108 CR3d 87 (jurors questioned concerning felony-murder rule that does not require intent to kill); *People v Vieira* (2005) 35 C4th 264, 285, 25 CR3d 337 (categorical prohibition of question whether juror would automatically vote for death for a defendant convicted of multiple murders would be error). In accord: *People v Carasi* (2008) 44 C4th 1263, 1287, 82 CR3d 265. The right to make such an inquiry exists whether or not the circumstance in question has been charged. *People v Cash, supra.* Denying this right to the defendant may cause a death sentence to be overturned. See *People v Cash, supra,* 28 C4th at 723.

The court should not permit, however, voir dire so specific that it leads prospective jurors to prejudge the penalty issue based on a summary of expected aggravating and mitigating evidence. 28 C4th at 721; *People v Zambrano* (2007) 41 C4th 1082, 1120–1123, 63 CR3d 297. Nor should the court permit questions about hypothetical cases. *People v Carter* (2005) 36 C4th 1114, 1178, 32 CR3d 759. The trial court also has discretion to prevent voir dire on specific facts, even those that are central to the prosecution's case. *People v Butler* (2009) 46 C4th 847, 858–862, 95 CR3d 376. The court need not permit questions that include an admonition against prejudgment but would nevertheless lead prospective jurors to focus on specific facts and form opinions about the appropriate penalty before hearing the evidence. *People v Tate* (2010) 49 C4th 635, 654–660, 112 CR3d 156 (no questions about victim having been bludgeoned, been stabbed multiple times, and had a finger severed).

Interracial Crime. A capital defendant accused of an interracial crime is entitled, upon request, to have prospective jurors informed of the victim's race and questioned about racial bias. *Turner v Murray* (1986) 476 US 28, 36–37, 106 S Ct 1683, 90 L Ed 2d 27; see *People v Earp, supra,* 20 C4th at 854.

Photographs. The court is not required to let defense counsel show prospective jurors photographs that the prosecution will introduce at trial and ask whether they could render a fair penalty decision after having seen them. *People v Whisenhunt* (2008) 44 C4th 174, 197, 79 CR3d 125

(defense had unsuccessfully moved in limine to exclude photos in question as unduly prejudicial).

☛ JUDICIAL TIP: Permit counsel to ask questions about the effect of graphic or gruesome photos on the jurors' ability to reach a proper verdict. See *People v Whisenhunt, supra*.

d. [§98.45] Equivocal or Conflicting Responses

The trial judge has wide discretion to decide whether a prospective juror is disqualified under *Witt* when the juror's responses are equivocal or conflicting, *e.g., People v Moon* (2005) 37 C4th 1, 13, 32 CR3d 894; *People v Jackson* (1996) 13 C4th 1164, 1199, 56 CR2d 49; see *Uttecht v Brown* (2007) 551 US 1, 127 S Ct 2218, 167 L Ed 2d 1014. However, vague answers to unclear questions do not support a challenge for cause. *People v Heard* (2003) 31 C4th 946, 967, 4 CR3d 131; see *People v Stewart* (2004) 33 C4th 425, 446–447, 15 CR3d 656 (even clear answer to ambiguous question may not support challenge). The court should follow up on ambiguous answers or give counsel an opportunity to do so. See *People v Bittaker* (1989) 48 C3d 1046, 1084, 259 CR 630. It is important to word follow-up questions clearly. See §98.38.

In capital cases, jurors' answers are often halting, equivocal, or conflicting; such behavior is to be expected. *People v Moon, supra,* 37 C4th at 15; *People v Fudge* (1994) 7 C4th 1075, 1094, 32 CR2d 321; see *People v Gray* (2005) 37 C4th 168, 193, 32 CR3d 451.

Illustrations of equivocal or conflicting statements (trial court's decision to grant challenge for cause upheld) follow:

- Juror said she had mixed feelings about the death penalty and "I don't know (whether I could vote for it). I have to hear all the evidence." *People v Bolden* (2002) 29 C4th 515, 536, 127 CR2d 802; see *People v Schmeck* (2005) 37 C4th 240, 262, 33 CR3d 397 (jurors could not state that they would be able to consider imposing death penalty); *People v Griffin* (2004) 33 C4th 536, 559–560, 15 CR3d 743 (juror said she supported death penalty but did not know whether she could vote to impose it; challenge for cause upheld).

☛ JUDICIAL TIP: Some judges would deny such a challenge.

- Juror repeatedly expressed strong opposition to death penalty but stated she would follow the court's instructions. *People v Cook* (2007) 40 C4th 1334, 1341, 58 CR3d 340; see *People v Avila* (2006) 38 C4th 491, 532, 43 C3d 1; *People v Lewis* (2001) 26 C4th 334, 352, 110 CR2d 272.

☛ JUDICIAL TIP: Scrupulously treat death penalty supporters the same way. See *People v Thornton* (2007) 41 C4th 391, 425, 61

CR3d 461; *People v Champion* (1995) 9 C4th 879, 908, 39 CR3d 547; §98.41.

- Juror said he could vote for death "if I felt it was appropriate," but when asked if he could ever see himself feeling it was appropriate, he answered: "I don't know." *People v Welch* (1999) 20 C4th 701, 747, 85 CR2d 203.
- Juror said: "I would tend to think I wouldn't be able to [impose death sentence], but I don't know." She also said she leaned against the death penalty, although not totally opposed, and she agreed with the judge "that for all practical purposes" she could not impose the death penalty on anyone. *People v Cain* (1995) 10 C4th 1, 60, 40 CR2d 481.
- Juror said she was willing to vote for death "if the evidence was overwhelming," but repeatedly answered "I don't know" when asked if she was able to vote for death if all the evidence indicated that it was the appropriate sentence. *People v Wash* (1993) 6 C4th 215, 255, 24 CR2d 421 (decision includes additional examples of ambivalent responses by other prospective jurors).
- Juror said she did not believe she could vote for death penalty; later she said she did not know whether she could. *People v Garceau* (1993) 6 C4th 140, 175, 24 CR2d 664; see *People v Ochoa* (1998) 19 C4th 353, 442, 79 CR2d 408; *People v Barnett* (1998) 17 C4th 1044, 1115, 74 CR2d 121.
- Juror answered the question of whether juror would refuse to vote for death regardless of the evidence with "I think so." *People v Frierson* (1991) 53 C3d 730, 742, 280 CR 440.
- Juror answered inconsistently whether she could vote for death for a defendant with a prior murder conviction. *People v Carey* (2007) 41 C4th 109, 123, 59 CR3d 172.
- Juror expressed support for the death penalty, but was unable to say she could set aside her reluctance to be personally responsible for sentencing someone to death. *People v Solomon* (2010) 49 C4th 792, 836, 112 CR3d 244.
- Juror expressed strong opposition to death penalty, but said she might vote for it if the defendant was "really, really guilty." *People v Thomas* (2011) 51 C4th 449, 464–466, 121 CR3d 521.

e. [§98.46] Limiting Efforts To Rehabilitate Disqualified Juror

Once a juror has made his or her inability to vote for death (or LWOP) clear, the court can properly prohibit further questions that would

otherwise be appropriate. *People v Kaurish* (1990) 52 C3d 648, 699, 276 CR 788 ("Do you think you could put your personal feelings aside and follow the judge's instructions?").

Similarly, the trial judge can properly preclude counsel from trying to rehabilitate a juror by showing hypothetical circumstances under which the juror would vote contrary to his or her stated views. *People v Mattson* (1990) 50 C3d 826, 846, 268 CR 802 (defense properly blocked from asking anti-capital punishment jurors whether they could vote for death if defendant were shown to pose a danger to guards or other inmates).

5. [§98.47] Opinion That LWOP Does Not Mean LWOP

Many citizens have a high degree of skepticism whether a sentence of life without possibility of parole really means that a defendant sentenced to LWOP will spend the rest of his or her life in prison. Such a point of view might make a juror more likely to vote for death.

Many judges believe that they should not wait for prospective jurors to raise questions about LWOP, but also that counsel should not be allowed to open up the area. Those judges advise prospective jurors that they are to assume that a sentence they decide on, whether death or LWOP, will be carried out. For a particularly thorough explanation of LWOP to jurors, see spoken form in §98.103. Some judges then ask jurors individually whether they could and would make this assumption in the event the trial reached the penalty phase. Judges generally permit little, if any, attorney voir dire about LWOP views.

A prospective juror who expresses unwillingness to assume that LWOP means LWOP is disqualified. See *People v Boyette* (2002) 29 C4th 381, 417–418, 127 CR2d 544. A juror who has doubts about LWOP is not automatically disqualified as long as the juror is promptly told to assume that the chosen penalty, death or LWOP, will be carried out, and the juror then states that he or she will make such an assumption for purposes of the trial. *People v Hinton* (2006) 37 C4th 839, 860, 38 CR3d 149. The same is true of the occasional juror who regards LWOP as a worse punishment than death. See *People v Millwee* (1998) 18 C4th 96, 147, 74 CR2d 418 (juror disqualified if insistent on following this view regardless of instructions); *People v Ochoa* (1998) 19 C4th 353, 446, 79 CR2d 408 (juror who believes LWOP is cruel and unjust, but says he would not vote for death simply because of his views, is not disqualified); *People v Carpenter* (1999) 21 C4th 1016, 1036, 90 CR2d 607 (view that LWOP is harsher punishment is part of entire picture court may consider).

☛ JUDICIAL TIP: Some judges inform such a juror that the prosecution and defendant feel death is worse.

6. [§98.48] Effects of Granting or Denying Challenge in Violation of *Witt* Standard

Exclusion of a prospective juror in violation of *Witt* requires automatic reversal of the penalty; the guilt phase does not have to be retried. *Gray v Mississippi* (1987) 481 US 648, 666, 107 S Ct 2045, 95 L Ed 2d 622; *People v Kelly* (2007) 42 C4th 763, 777, 68 CR3d 531. Erroneous exclusions on non-Witt grounds are not subject to automatic reversal. *People v Tate* (2010) 49 C4th 635, 672, 112 CR3d 156.

Denial of a challenge in violation of *Witt* is reviewed under a harmless-error standard. *People v Coleman* (1988) 46 C3d 749, 768, 251 CR 83. On review, the court will consider a claim of improper inclusion only if defendant exhausted all peremptory challenges and objected to the jury ultimately selected, or justifies the failure to do so. *People v Williams* (1997) 16 C4th 635, 667, 66 CR2d 573. The error is harmless when the objectionable prospective juror does not sit on the jury, unless the defendant can show actual prejudice. *People v Yeoman* (2003) 31 C4th 93, 114, 2 CR3d 186; *People v Boyette* (2002) 29 C4th 381, 419, 127 CR2d 544. But the error is fatal when the properly challenged juror ends up sitting on the jury after the defendant has used all peremptory challenges; under those circumstances, the sentence will be reversed. See *Ross v Oklahoma* (1988) 487 US 81, 85, 108 S Ct 2273, 101 L Ed 2d 80; *People v Williams, supra.*

Whether the claim concerns the granting or denial of a *Witt* challenge, the trial judge's determination is generally binding when the juror's responses were equivocal or conflicting; otherwise the ruling is upheld when it is based on substantial evidence. *People v Wash* (1993) 6 C4th 215, 254, 24 CR2d 421.

7. [§98.49] Stating Reasons for Rulings on *Witt* Challenges

Trial judges are not required to state on the record the reasons for ruling on a challenge for cause. However, most judges state their reasons when deciding a challenge based on *Witt* in order to facilitate review.

☛ JUDICIAL TIP: A statement of reasons is particularly useful when the decision is affected by observations, such as a juror's tone of voice or body language, that are not otherwise apparent from the record. See *People v Coleman* (1988) 46 C3d 749, 768 n12, 251 CR 83 (court should set out reasons for denying challenge when uncontradicted record shows prospective juror's lack of partiality). Stating reasons becomes especially important when, as often happens, a juror has given inconsistent answers to questions about capital punishment. The judge need say only: "I believe _____ was telling the truth when (he or she) said that . . . ."

8. [§98.50] Granting Additional Peremptory Challenge To Cure *Witt* Error

When a trial court *grants* a challenge in violation of *Witt*, there is nothing it can do to remedy the situation (other than grant a new penalty phase trial). However, when the court improperly *denies* such a challenge and discovers its mistake in time, it can probably cure the error by giving the defendant an additional peremptory challenge. See *People v DePriest* (2007) 42 C4th 1, 23, 63 CR3d 896 (constitutional right to additional peremptory on showing at least that defendant would otherwise be likely to receive trial before biased jury); *People v Yeoman* (2003) 31 C4th 93, 118–119, 2 CR3d 186 (failure to do so is reversible only when reasonably likely to result in unfair trial before partial jury); *People v Bittaker* (1989) 48 C3d 1046, 1088, 259 CR 630 (erroneous denial of challenge for cause curable only by giving defendant an added peremptory challenge).

☛ JUDICIAL TIP: If the occasion arises, the judge should strongly consider giving the defendant an added peremptory challenge; that solution is a lot better than running the risk of a retrial. When the judge realizes the error while the juror is still in the box, the judge can obviate the problem by simply excusing the juror.

9. [§98.51] Judge's Authority To Excuse Jurors for Cause Sua Sponte

The trial judge has the power, but not the obligation, to excuse biased jurors for cause in the absence of a challenge. *People v Kipp* (1998) 18 C4th 349, 365, 75 CR2d 716; *People v Bolin* (1998) 18 C4th 297, 315–316, 75 CR2d 412; *People v Lucas* (1995) 12 C4th 415, 481 n13, 48 CR2d 525.

10. [§98.52] Inapplicability of *Witt* to Peremptory Challenges

The *Witt* standard applies only to challenges for cause; the prosecutor is free to peremptorily excuse prospective jurors who expressed scruples about the death penalty but who are not subject to challenge for cause. *People v Salcido* (2008) 44 C4th 93, 144, 79 CR3d 54; *People v Champion* (1995) 9 C4th 879, 907, 39 CR2d 547.

IV. GUILT PHASE: SPECIAL CIRCUMSTANCES

A. Matters Applicable Generally to Special Circumstances

1. [§98.53] Tried With Underlying Charges

The guilt phase of the trial usually encompasses the underlying criminal charges as well as charged special circumstances. Pen C §§190.1(a), 190.4(a). The prosecution presents evidence of special circum-

stances as part of its case-in-chief, and the jury decides whether they are true in the same deliberations during which it determines guilt.

2. [§98.54] Exceptions

Separate trials on special circumstances are necessary in the following situations:

- *Prior murder conviction.* When the special circumstance is a prior first or second degree murder conviction, a separate trial is necessary. Pen C §190.1(b); see §98.70;
- *Highly prejudicial evidence.* A separate trial is required when the evidence is relevant only to the special circumstance and is highly prejudicial. *People v Stanley* (1995) 10 C4th 764, 798–799, 42 CR2d 543; *People v Bigelow* (1984) 37 C3d 731, 748, 209 CR 328; for further discussion, see §98.55; or
- *Jury waiver.* If defendant and prosecutor waive a jury as to the special circumstance determination, a separate trial must be held. Pen C §190.4(a).

☛ JUDICIAL TIP: This requires a separate jury waiver, even if defendant waived jury as to the trial of the underlying offense. *People v Memro* (1985) 38 C3d 658, 704, 214 CR 832; Pen C §190.4(a). If the defendant was convicted by the court sitting without a jury, the trier of fact of the special circumstance charges must be a jury unless a jury is waived; see *People v Moreno* (1991) 228 CA3d 564, 279 CR 140, disapproved on other grounds in 3 C4th 1088, 1104–1105 (no automatic reversal for failure to obtain separate waiver).

- *Hung jury.* When the jury cannot agree that at least one special circumstance is true or that all are untrue, a separate trial must be conducted. See §98.64.

3. [§98.55] Highly Prejudicial Evidence

An illustration of highly prejudicial evidence that necessitates a separate trial is evidence of uncharged crimes offered to prove that defendant committed the murder to avoid being arrested for those crimes. *People v Bigelow* (1984) 37 C3d 731, 748, 209 CR 328; see *People v Fierro* (1991) 1 C4th 173, 229, 3 CR2d 426. However, evidence is not unduly prejudicial merely because it is relevant only to a special circumstance and not to guilt. *People v Bigelow, supra.*

☛ JUDICIAL TIP: When evidence is germane solely to a special circumstance, the judge should admonish and instruct the jury about the limited use of such evidence. *People v Bigelow, supra*.

Nor does prejudice arise when the planned defense evidence relating to a special circumstance is inconsistent with the defense to the murder; such inconsistency does not generally warrant separate trials. *People v Stanley* (1995) 10 C4th 764, 798, 42 CR2d 543; *People v Fierro, supra*, 1 C4th at 228.

4. Issues Relating to Proof of a Special Circumstance

a. [§98.56] Burden and Quantum of Proof

The prosecution has the burden of proving the truth of each special circumstance beyond a reasonable doubt. Pen C §190.4(a); 3 Witkin & Epstein, California Criminal Law, *Punishment* §§461–462 (3d ed 2000).

b. Proof of Intent To Kill

(1) [§98.57] Actual Killer

The actual killer need not have had any intent to kill at the time of the offense on which the special circumstance is based (Pen C §190.2(b)), unless the statute defining the particular special circumstance requires this intent. For murder committed between 1983 and 1987, intent to kill was an element of felony-murder special circumstances even when the defendant was the actual killer. *People v Haley* (2004) 34 C4th 283, 288, 17 CR3d 877; *People v Marshall* (1997) 15 C4th 1, 41, 61 CR2d 84, and cases discussed in that opinion.

☛ JUDICIAL TIP: When trying a felony murder special circumstance occurring between 1983 and 1987, failure to give the correct intent instruction invites reversal. See *People v Carter* (2005) 36 C4th 1114, 1187, 32 CR3d 759 (reversible error unless harmless beyond reasonable doubt); *People v Marshall, supra,* 15 C4th at 44.

(2) [§98.58] Aiders and Abettors

Intent to kill is required for persons who aid or abet a murder as to all special circumstances except those specified by Pen C §190.2(a)(17). Pen C §190.2(c).

As to the felony murders listed in Pen C §190.2(a)(17), reckless indifference to human life is sufficient when the person who aided or abetted the felony acted as a major participant. Pen C §190.2(d); CALCRIM 720; as to sua sponte duty to give this instruction, see Bench Notes to CALCRIM 720. This provision applies to murders committed

after June 5, 1990; before then, intent to kill was required for felony murder accomplices. *Tapia v Superior Court* (1991) 53 C3d 282, 297–299, 279 CR 592. But see *People v Dickey* (2005) 35 C4th 884, 900–903, 28 CR3d 647 (aiding and abetting 1988 felony murder need not relate to act of killing, only to underlying felony).

The discussion of particular special circumstances (see §§98.65–98.99) also includes information about the requisite intent.

c. [§98.59] Proof of Corpus Delicti

The corpus delicti of a special circumstance does *not* have to be proved independently of defendant's extrajudicial statements. Pen C §190.41 (special circumstance under Pen C §190.2(a)(17); *People v Weaver* (2001) 26 C4th 876, 929, 111 CR2d 2 (when murder corpus delicti established, rape felony murder may be shown by defendant's extrajudicial statements); *People v Edelbacher* (1989) 47 C3d 983, 1023, 254 CR 586. The exception is a Pen C §190.2(a)(17) special circumstance (underlying murder committed during commission of specified felony) that occurred before June 6, 1990, the effective date of Pen C §190.41. *Tapia v Superior Court* (1991) 53 C3d 282, 298, 279 CR 592.

The corpus delicti rule is no longer a basis for excluding a defendant's extra-judicial statements from evidence. *People v Gutierrez* (2002) 28 C4th 1083, 1127, 124 CR2d 373; *People v Alvarez* (2002) 27 C4th 1161, 1165, 119 CR2d 903.

d. [§98.60] Corroboration of Accomplice Testimony

When the special circumstance requires proof of a crime other than the charged murder, the crime cannot be proved by an accomplice's uncorroborated testimony. *People v Hamilton* (1989) 48 C3d 1142, 1177, 259 CR 701. However, when the special circumstance requires proof of the motive of the charged murder, no corroboration is necessary. *People v Hamilton, supra.*

The corroborating evidence may be slight and entitled to little consideration standing alone, but "it must tend to implicate the defendant by relating to an act that is an element of the crime." *People v McDermott* (2002) 28 C4th 946, 986, 123 CR2d 654.

e. [§98.61] Multiple Overlapping Special Circumstances

The prosecution can generally charge and prove overlapping special circumstances such as lewd conduct, rape, and sodomy that occur during a continuous course of conduct against one victim. *People v Richardson* (2008) 43 C4th 959, 1029, 77 CR3d 163; *People v Melton* (1988) 44 C3d 713, 765, 244 CR 867. Similarly, when three victims are killed during a robbery, three robbery-murder special circumstances may be charged and

proved; Pen C §654 is inapplicable. *People v Andrews* (1989) 49 C3d 200, 224, 260 CR 583.

For restrictions on overlapping special circumstance charges, see §§98.66, 98.70, 98.73, 98.82.

When a special circumstance overlaps the circumstances of the capital offense, *e.g.,* robbery-murder, the penalty phase jury may not count it twice and should be so admonished on request. *People v Melton, supra,* 44 C3d at 768; see *People v Ramirez* (2006) 39 C4th 398, 476, 46 CR3d 677; CALCRIM 763; see also §98.75.

f. [§98.62] Inconsistent Theories

Inconsistent and irreconcilable attribution of crimes to codefendants in a death penalty trial without good faith violates due process (*In re Sakarias* (2005) 35 C4th 140, 160, 25 CR3d 265), as long as the attribution is material to the defendant's conviction or sentence. *Bradshaw v Stumpf* (2005) 545 US 175, 187, 125 S Ct 2398, 162 L Ed 2d 143 (may be material to sentence even when not affecting conviction).

Deliberately omitting evidence in the trial of one defendant so as to make possible the pursuit of inconsistent theories shows bad faith. *In re Sakarias, supra,* 35 C4th at 163.

5. Verdict

a. [§98.63] Unanimity; Form

The verdict on a special circumstance must be unanimous. See Pen C §190.2(a); for consequences of lack of unanimity, see discussion in §98.64. The jury must make a special finding for each special circumstance, stating that it is true or not true. Pen C §190.4(a). The finding is *only* as to the truth of the special circumstance allegation and normally does not include findings about specific facts or elements of a special circumstance. *People v Davenport* (1985) 41 C3d 247, 273, 221 CR 794. However, the court may request the jury to make additional special findings. See *People v Morales* (1989) 48 C3d 527, 549, 257 CR 64.

☛ JUDICIAL TIPS: Judges should:

- Observe limitations on submitting duplicative special circumstance charges to the jury. See §§98.66, 98.70, 98.73, 98.82.
- Use a separate verdict form for each special circumstance charge that goes to the jury. *People v Coddington* (2000) 23 C4th 529, 566 n7, 97 CR2d 528, overruled on other grounds in 25 C4th 1046, 1069 n13.
- Instruct jury clearly that it should complete the special circumstance verdicts *only* in the event it has found defendant

guilty of first degree murder. Some judges repeat this caution on the face of the verdict forms. The purpose of the instruction is to reduce the risk that the jury will find special circumstances without convicting defendant of first degree murder. When a jury does that, the special circumstance findings have no legal effect and should be stricken. Any guilty verdict(s) that the jury returns—*e.g.,* second degree murder—should be entered. See *People v Dailey* (1996) 47 CA4th 747, 757, 55 CR2d 171; *Bigelow v Superior Court* (1989) 208 CA3d 1127, 1136, 256 CR 528; *People v Williams* (1984) 157 CA3d 145, 155, 203 CR 562.

- Make sure that the murder verdict forms specify the degree. If they do not, a conviction will automatically be treated as one of second degree murder (*People v Dailey, supra),* unless the prosecution proceeded solely on a first degree theory and the court had correctly instructed the jury to return either an acquittal or a conviction of first degree murder (*People v Mendoza* (2000) 23 C4th 896, 900, 98 CR 431). Similarly, in a court trial, the court must specify the degree; finding the defendant "guilty as charged in count ___" becomes a conviction of murder in the second degree even if the count referred to charged first degree murder. *People v Williams, supra,* 157 CA3d at 153. The murder verdict forms should only provide for a guilty or not guilty verdict. Pen C §§1150–1151. When the prosecutor offers more than one theory of first degree murder, the court may use forms asking the jury to indicate which proffered theory it found true, if any. *People v Gurule* (2002) 28 C4th 557, 631, 123 CR2d 345.

☛ JUDICIAL TIP: Many judges avoid such hybrid verdict forms on the ground that the potential for confusion exceeds any likely usefulness.

b. [§98.64] Effect of Lack of Unanimity

Following are steps the judge should take when there is lack of unanimity:

- *Jury finds one special circumstance true, but fails to agree on others.* The judge should proceed to the penalty phase; special circumstances on which the jury could not agree are not retried. Pen C §190.4(a).
- *Jury cannot agree that at least one special circumstance is true or that all are untrue.* The jury must be dismissed and a new jury impaneled to try *only* the special circumstances on which the jury hung. Pen C §190.4(a).

- *A second jury cannot agree that at least one special circumstance is true (or that all are untrue).* The judge may either order a third jury or sentence defendant. Pen C §190.4(a). Penal Code §190.4(a) specifies a 25-year sentence. But see Pen C §190(a) (providing for a term of 25 years to life as punishment for first degree murder). In the unlikely event of a second hung jury, most judges would sentence the defendant rather than order a third trial.

☛ JUDICIAL TIP: If a second (or third) jury finds at least one special circumstance to be true, it is that jury that hears the penalty phase, because the earlier jury has been dismissed.

B. Particular Special Circumstances

1. Murder for Financial Gain (Pen C §190.2(a)(1))

a. [§98.65] Crimes to Which Applicable

This special circumstance consists of two elements: (1) an intentional murder (2) carried out for financial gain. The key inquiry is whether the killer committed the murder with the expectation of gaining financially from it. *People v Howard* (1988) 44 C3d 375, 409, 243 CR 842; *People v Mickey* (1991) 54 C3d 612, 678, 286 CR 801.

For example, in a murder-for-hire the special circumstance may apply to a hirer who had no financial motive, as long as the hired gun had an expectation of financial gain. *People v Freeman* (1987) 193 CA3d 337, 339, 238 CR 257. It also applies to the killer even though he or she had no specific agreement with the hirer to kill the victim. *People v Howard, supra* (employer wanted competitor "roughed up").

Courts interpret "financial gain" broadly and nontechnically to include such matters as avoiding a debt (*People v Edelbacher* (1989) 47 C3d 983, 1035, 254 CR 586), preventing the discovery of embezzlement (*People v Silberman* (1989) 212 CA3d 1099, 1111, 261 CR 45), receiving a small amount of drugs (*People v Padilla* (1995) 11 C4th 891, 933, 47 CR2d 426, overruled on other grounds in 17 C4th 800, 823 n1), and eliminating a business competitor (*People v McLead* (1990) 225 CA3d 906, 917, 276 CR 187). Proof of actual pecuniary benefit from the victim's death is neither necessary nor sufficient. *People v Staten* (2000) 24 C4th 434, 461–462, 101 CR2d 213; *People v Edelbacher, supra.* Avoiding child support payments is a financial gain even though the victim's death would not end defendant's obligation to support the child. *People v Carasi* (2008) 44 C4th 1263, 1308, 82 CR3d 265.

Financial gain need not be the primary motive for the murder, as long as it is a motive. *People v Carasi supra; People v Sapp* (2003) 31 C4th 240, 282, 2 CR3d 554.

b. [§98.66] Limitation: Does Not Apply to Felony-Murder-Burglary or Robbery

The murder-for-financial-gain special circumstance does not apply to facts that show a felony murder committed during a robbery or burglary. *People v Michaels* (2002) 28 C4th 486, 519, 122 CR2d 285; *People v Bigelow* (1984) 37 C3d 731, 751, 209 CR 328.

☛ JUDICIAL TIPS:

- An overlapping financial gain special circumstance should not go to the jury. See *People v Mickey, supra.* Alternatively, the third paragraph of CALCRIM 720 or CALJIC 8.81.1 should be included in the jury instructions.
- The defense may use language from *People v Bigelow, supra,* to urge additional limitations, but such efforts have consistently failed. Examples include *People v Howard* (1988) 44 C3d 375, 410, 243 CR 842, and *People v Silberman* (1989) 212 CA3d 1099, 1112, 261 CR 45.

c. [§98.67] Instructions

CALCRIM 720 and CALJIC 8.81.1 cover this special circumstance. Instruction in the statutory language is also permissible. *People v Padilla* (1995) 11 C4th 891, 934, 47 CR2d 426, overruled on other grounds in 17 C4th 800, 823 n1.

☛ JUDICIAL TIPS: Judges should reject proposed instructions that would:

- Define "financial gain" (*People v Howard* (1988) 44 C3d 375, 408, 243 CR 842),
- Require financial gain to be the primary goal or dominant motive of the murder (*People v Noguera* (1992) 4 C4th 599, 634, 15 CR2d 400), or
- State that defendant had to have the requisite intent at the time of the killing (4 C4th at 639).

When more than one act supports the financial gain special circumstance, the jury should be instructed that it must unanimously agree on a single act in order to find the special circumstance true. See *People v Sapp* (2003) 31 C4th 240, 283, 2 CR3d 554.

2. Previous Murder Conviction (Pen C §190.2(a)(2))

a. [§98.68] Elements

The elements of this special circumstance are that (1) defendant has been convicted (2) previously (3) of first or second degree murder. Pen C §190.2(a)(2).

A "previous" conviction is one that occurred in a prior proceeding. *People v Hendricks* (1987) 43 C3d 584, 596, 238 CR 66. Two consequences follow:

- When defendant is charged in the *present* proceeding with murdering two people, the jury may not find a previous murder conviction based on the killing of either of those victims. The multiple murder special circumstance may apply instead. 43 C3d at 595; see §98.71; for the converse result when the two counts are severed, see §98.74.
- The previous conviction need only have occurred before the present proceeding—neither the prior conviction nor the homicide on which it was based has to precede the homicide(s) charged in the current case. *People v Hinton* (2006) 37 C4th 839, 879, 38 CR3d 149; *People v Grant* (1988) 45 C3d 829, 848, 248 CR 444.

Intent to kill is not an element of this special circumstance, a matter that has been settled since *Hendricks* but continues to be raised unsuccessfully. See, *e.g., People v Gurule* (2002) 28 C4th 557, 633, 123 CR2d 345; *People v Neely* (1993) 6 C4th 877, 899, 26 CR2d 189.

b. [§98.69] Out-of-State Convictions

A previous conviction from a foreign jurisdiction qualifies as a special circumstance if it was for an offense punishable as first or second degree murder had it been committed in California. Pen C §190.2(a)(2).

The purpose of this provision is "to limit the use of foreign convictions to those which include all the elements of the offense of murder in California." *People v Andrews* (1989) 49 C3d 200, 223, 260 CR 583. See *People v Martinez* (2003) 31 C4th 673, 684, 3 CR3d 648 (Texas plea to shooting victim intentionally and knowingly includes malice). But the foreign jurisdiction need not use the same procedures or permit the same defenses as California courts. *People v Andrews*, *supra,* 49 C3d at 221–224 (Alabama conviction of murder by 16-year-old tried as adult without finding that he was unfit to be treated as a juvenile); *People v Trevino* (2001) 26 C4th 237, 109 CR2d 567 (Texas conviction of murder by 15-year-old tried as adult when California law at the time prohibited such trial); *People v Martinez* (1991) 230 CA3d 197, 281 CR 205 (Texas does not accept concept of imperfect self-defense).

☛ JUDICIAL TIPS: The focus should be on the *elements* of an out-of-state conviction. See *People v Martinez, supra.* For instructing the jury on out-of-state convictions, see CALCRIM 750; CALJIC 8.82.

c. [§98.70] Special Procedural Requirements

A prior murder conviction is the one special circumstance that must be tried separately from the guilt phase, unless waived by the defendant. *People v Farnam* (2002) 28 C4th 107, 145, 121 CR2d 106; Pen C §190.1(b); see §98.54. But evidence of a prior murder, as distinguished from a *conviction,* is admissible to the same extent as evidence of other prior crimes. See, *e.g., People v Steele* (2002) 27 C4th 1230, 1243, 120 CR2d 432 (admissible during guilt phase to show intent to kill, premeditation, and deliberation when sufficiently similar); *People v Catlin* (2001) 26 C4th 81, 119–123, 109 CR2d 31; Evid C §1101.

When a defendant faces several murder counts and has an alleged prior murder conviction, only one previous murder special circumstance should be submitted to the jury—not one for each current charge. *People v Andrews* (1989) 49 C3d 200, 224, 260 CR 583; *People v Allen* (1986) 42 C3d 1222, 1273, 232 CR 849. However, a defendant who has more than one prior murder conviction is subject to a prior murder special circumstance for each of the convictions. *People v Danks* (2004) 32 C4th 269, 314, 8 CR3d 767.

As to defendant's right to challenge the validity of a prior conviction, see §98.19.

3. Multiple Murder Convictions (Pen C §190.2(a)(3))

a. [§98.71] Convictions to Which Applicable in General; Jurisdiction

The prerequisites of this special circumstance are that in the present case defendant was convicted of at least (1) one first degree murder and (2) one additional first or second degree murder. *People v Cooper* (1991) 53 C3d 771, 828, 281 CR 90.

☛ JUDICIAL TIP: When instructing, judges should use CALCRIM 721 or CALJIC 8.81.3, rather than the confusing statutory language.

Intent is not an element unless defendant was an accomplice rather than the actual killer. *People v Williams* (1997) 16 C4th 635, 687–691, 66 CR2d 573 (when defendant is aider and abettor, failure to instruct on intent is prejudicial); *People v Anderson* (1987) 43 C3d 1104, 1149, 240 CR 585; Pen C §190.2(b). Killing an unintended victim in addition to the intended one qualifies as multiple murder. *People v Gomez* (2003) 107

CA4th 328, 131 CR2d 848; see *People v Bland* (2002) 28 C4th 313, 317, 321–326, 121 CR2d 546 (transferred intent). A conviction of three murder counts for killing a single victim would not qualify. See *People v Coyle* (2009) 178 C4th 209, 217, 100_CR3d 245 (one killing, one conviction).

The prosecution may charge only one multiple murder special circumstance, not one for each count. *People v v Halvorsen* (2007) 42 C4th 379, 422, 64 CR3d 721; *People v Harris* (1984) 36 C3d 36, 67, 201 CR 782, disapproved on other grounds in 49 C3d 502, 526 n12. When a multiple murder special circumstance is charged, jurisdiction is governed by Pen C §790(b) (any county with jurisdiction over one of the murders connected together in their commission); for jurisdiction in homicide cases generally, see Pen C §790(a).

The trial court has discretion whether to admit an expert's opinion that the charged murders were committed by the same person. *People v Prince* (2007) 40 C4th 1179, 1219, 57 CR3d 543.

b. [§98.72] Murder of Mother and Fetus

The murder of a pregnant woman and her fetus in a single act by a defendant who knew of the pregnancy is a multiple murder. *People v Bunyard* (1988) 45 C3d 1189, 1237, 249 CR 71. Defendant's ignorance of the pregnancy makes the killing of the fetus second degree murder. *People v Taylor* (2004) 32 C4th 863, 11 CR3d 510.

Bunyard held that the fetus had to be viable, but this is no longer required for fetal murder under Pen C §187(a). *People v Davis* (1994) 7 C4th 797, 809–810, 30 CR2d 50. *Davis* is only prospective. 7 C4th at 811. One consequence of the rule that the fetus need not be viable makes evidence inadmissible that the fetus would not have survived until birth even without defendant's act. *People v Valdez* (2005) 126 CA4th 575, 579, 23 CR3d 909.

The death of an *infant* as a result of an attack on its pregnant mother is murder of a human being, not fetal murder. *People v Taylor* (2004) 119 CA4th 628, 636–639, 14 CR3d 550; see Pen C §187(a) (murder is unlawful killing of a human being *or* a fetus).

Penal Code §12022.9 (additional sentence for inflicting injury causing termination of pregnancy) is not a lesser included or related offense to fetal murder. *People v Dennis* (1998) 17 C4th 468, 500, 71 CR2d 680.

c. Procedural Matters

(1) [§98.73] Single Charge

Defendant should be charged only with one multiple murder special circumstance; only one should be submitted to the jury. *People v Hamilton* (1988) 46 C3d 123, 144, 249 CR 320; *People v Anderson* (1987) 43 C3d 1104, 1150, 240 CR 585. Cumulative findings are harmless at the guilt

phase, but may be prejudicial at the penalty phase. *People v Williams* (1988) 44 C3d 883, 927, 245 CR 336; see *People v McWhorter* (2009) 47 C4th 318, 377, 97_CR3d 412 (double counting found harmless when it did not lead jury to consider inadmissible evidence). A single finding of a multiple murder special circumstance applies "to *all* the murders of which defendant is convicted." [Emphasis in original.] *People v Garnica* (1994) 29 CA4th 1558, 1563, 35 CR2d 229.

(2) [§98.74] Severed Counts

When two murder counts are severed for trial, the charge of multiple murder special circumstance should be dismissed; a previous murder conviction can be charged instead when the first case to be tried results in such a conviction. *Shamburger v Superior Court* (1984) 160 CA3d 484, 487, 207 CR 586.

4. [§98.75] By Destructive Device (Pen C §190.2(a)(4), (6))

The difference between the two statutory provisions is that Pen C §190.2(a)(4) covers planted or hidden devices and Pen C §190.2(a)(6) covers mailed or "delivered" ones. The elements of a murder-by-destructive-device special circumstance are:

- The murder was committed by a destructive device, bomb, or explosive;
- The device was either planted, hidden or concealed, or mailed or delivered by defendant; and
- The defendant knew or reasonably should have known that the conduct would create a great risk of death.

Penal Code §12301 defines destructive devices. For the definition of "bomb," see CALCRIM 722 Bench Notes and CALJIC 8.81.4; for "explosive," see Health & S C §12000, CALCRIM 722, and CALJIC 8.81.4. Gasoline is not an explosive (*People v Clark* (1990) 50 C3d 583, 601–606, 268 CR 399), but a lit gasoline-filled bottle is a destructive device (see *People v Snead* (1993) 20 CA4th 1088, 1094, 24 CR2d 922, disapproved on other grounds in *People v Letner & Tobin* (2010) 50 C4th 99, 182, 112 CR3d 746).

☛ JUDICIAL TIP: Instructions should be more concise than the statutory language of Pen C §12301. See CALCRIM 722; CALJIC 8.81.4.

The term "deliver" in Pen C §190.2(a)(6) includes throwing. *People v Snead, supra.*

Related statutes include Pen C §189 (murder "perpetrated by means of a destructive device or explosive" is first degree murder) and Pen C

§12310(a) (causing death by willful and malicious use of destructive device or explosive punishable by LWOP). A defendant can be charged with and convicted of special circumstance murder and violation of Pen C §12310(a), but can be punished for only one of these two offenses. *People v Thompson* (1994) 24 CA4th 299, 308, 29 CR2d 847.

No intent other than the one specified in Pen C §190.2(a)(4) or (6) is required of the actual killer. Pen C §190.2(b).

5. [§98.76] Murder To Prevent Arrest or Perfect Escape (Pen C §190.2(a)(5))

This special circumstance requires a murder committed for one of the following purposes (Pen C §190.2(a)(5)):

- Avoiding a lawful arrest;
- Preventing a lawful arrest;
- Perfecting an escape from lawful custody;
- Attempting to perfect such an escape.

The first two special circumstances apply only if arrest is imminent. *People v Coleman* (1989) 48 C3d 112, 145–146, 255 CR 813 (victim tried to escape; no evidence that imminent arrest was possible); *People v Bigelow* (1984) 37 C3d 731, 752, 209 CR 328 (defendants not threatened with imminent arrest; argument that victim was killed to prevent reporting crime to police rejected as speculative); contrast *People v Cummings* (1993) 4 C4th 1233, 1300, 18 CR2d 796 (defendant killed police officer who had detained him under conditions making arrest highly likely; special circumstance finding upheld).

☛ JUDICIAL TIP: It is not mandatory to instruct about imminence of arrest, but it is a good idea to do so on request when there is any question about how imminent arrest was. See *People v Cummings, supra,* 4 C4th at 1300–1301; CALCRIM 723. CALJIC 8.81.5 can easily be modified to read: ". . . the following facts must be proved: The murder was committed for the purpose of avoiding or preventing *an imminent* lawful arrest." [Addition in italics.] Some judges also define "imminent" on request.

The special circumstance of killing to perfect an escape does not apply once the defendant has reached a place of temporary safety. *People v Bigelow, supra,* 37 C3d at 754.

Only the intent specified in Pen C §190.2(a)(5) needs to be proved as to the actual killer. Pen C §190.2(b).

The jury may find both this special circumstance and the one of murder of a peace officer in the performance of his duties. *People v Ervine* (2009) 47 C4th 745, 789, 102 CR3d 786.

6. [§98.77] Peace Officer Victim (Pen C §190.2(a)(7))

Penal Code §190.2(a)(7) creates two different special circumstances. The elements of the first are that (1) defendant intentionally killed (2) a peace officer, as defined, (3) while the officer was engaged in the performance of his or her duties, and (4) defendant knew or reasonably should have known that

- The victim was a peace officer and that
- The victim was so engaged.

The officer must have been acting lawfully when the offense was committed. For example, when the defendant was under arrest at the time he shot a peace officer, the special circumstance applies only if the arrest was lawful. *People v Cruz* (2008) 44 C4th 636, 673–675, 80 CR3d 126.

The elements of the second are: (1) defendant intentionally killed (2) a peace officer or former peace officer (3) in retaliation for the officer's performance of his or her official duties. CALCRIM 724; CALJIC 8.81.7. This special circumstance requires a subjective purpose to retaliate for performance of official duties. *People v Jenkins* (2000) 22 C4th 900, 1021, 95 CR2d 377.

As to overlap with murder to avoid arrest special circumstance, see §98.76.

a. [§98.78] Peace Officer

Propositions 114 and 115, passed in June 1990, defined "peace officer" in Pen C §190.2(a)(7) differently. The broader definition of Proposition 114 is effective. *Yoshisato v Superior Court* (1992) 2 C4th 978, 991, 9 CR2d 102. That definition was carried over into the 1996 revision.

b. [§98.79] Performance of Duties

To be engaged in the performance of duties, "the officer must have been acting lawfully at the time." *People v Mayfield* (1997) 14 C4th 668, 790, 60 CR2d 1. An officer who is serving a facially valid search warrant not based on adequate probable cause is performing his or her duties, but one who serves a warrant in violation of knock-notice rules is not. *People v Gonzalez* (1990) 51 C3d 1179, 1218, 1223, 275 CR 729. For instructions on the requirement that the officer be engaged in performance of duties, see CALCRIM 724, 2670; CALJIC 8.81.8. The prosecution need not prove that the defendant subjectively understood the lawfulness of the officer's conduct. *People v Jenkins* (2000) 22 C4th 900, 1021, 95 CR2d 377.

7. [§98.80] Federal Law Enforcement Officer Victim (Pen C §190.2(a)(8))

This provision covers murders of federal law enforcement officers or agents. It is similar to the peace officer victim provision discussed in §98.77 with two differences:

- It does not define the term "federal law enforcement officer or agent," probably because many widely scattered federal statutes endow particular federal employees with law enforcement powers.
- It does not apply to the retaliatory killing of a *former* federal officer or agent.

Like Pen C §190.2(a)(7), subsection (a)(8) expressly requires the killings to have been intentional in order to qualify as a special circumstance.

8. [§98.81] Firefighter Victim (Pen C §190.2(a)(9))

This provision parallels the first part of the peace officer victim subsection discussed in §98.77. The elements of a Pen C §190.2(a)(9) special circumstance are: (1) defendant intentionally killed (2) a firefighter, as defined in Pen C §245.1, (3) while the firefighter was engaged in performing his or her duties, and (4) defendant knew or reasonably should have known that

- The victim was a firefighter, and
- The victim was so engaged.

CALJIC 1.27 defines a firefighter's duties as "firefighting, fire supervision, fire suppression, fire prevention, or fire investigation." CALCRIM does not appear to have a definition.

9. [§98.82] Witness Victim (Pen C §190.2(a)(10))

Penal Code §190.2(a)(10) defines two witness-killing special circumstances: murder to prevent a witness from testifying in a criminal proceeding (discussed in §98.83) and murder in retaliation for having testified (see §98.84). Witness as used in subsection (a)(10) is not limited to an eyewitness; the term includes any witness who might testify in a criminal proceeding (*People v Zambrano* (2007) 41 C4th 1082, 1150, 63 CR3d 297), whether or not such a proceeding is pending. *People v Jenkins* (2000) 22 C4th 900, 1018, 95 CR2d 377.

The prosecution may offer evidence on both the theory that the victim was killed in retaliation for having testified, as well as on the theory that the victim was killed to keep the victim from testifying in an anticipated future trial. However, only one witness-victim special circumstance may be charged and found for one witness-victim. *People v*

Allen (1986) 42 C3d 1222, 1273, 232 CR 849. The jurors probably need not agree unanimously on one of the two theories. See *People v Edwards* (1991) 54 C3d 787, 824, 1 CR2d 696.

"Criminal proceeding" includes a hearing in which the victim gives a sworn oral statement before a magistrate in support of a search warrant application. *People v Silverbrand* (1990) 220 CA3d 1621, 1627, 270 CR 261. The special circumstance also applies to testimony in juvenile proceedings under Welf & I C §602 or §707. Pen C §190.2(a)(10) (offenses after June 5, 1990).

a. [§98.83] Killing To Prevent Testimony

The elements of this special circumstance are: "(1) a victim who has witnessed a crime prior to, and separate from, the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the witness from testifying." *People v Garrison* (1989) 47 C3d 746, 792, 254 CR 257; *People v Stanley* (1995) 10 C4th 764, 801, 42 CR2d 543; see CALJIC 8.81.10. In accord: *People v San Nicolas* (2004) 34 C4th 614, 654, 21 CR3d 612. The first element is not met when the killing of the witness is part of a continuous criminal transaction. 34 C4th at 655.

☛ JUDICIAL TIP: Judges should reject proposed instructions that impose additional mental state requirements, *e.g.,* that the dominant purpose of the murder was to keep the victim from testifying (*People v Stanley, supra,* 10 C4th at 799–801) or that defendant must believe at the time of the killing that criminal proceedings were pending (*People v Sanders* (1990) 51 C3d 471, 517, 273 CR 537).

The statute "expressly excludes a killing committed during the commission of the crime to which the victim was a witness." *People v Stanley, supra,* 10 C4th at 801. The special circumstance does not apply when the witnessed offense and the killing of the witness are part of the same continuous criminal transaction. See, *e.g., People v Beardslee* (1991) 53 C3d 68, 95, 279 CR 276; *People v Garrison, supra,* 47 C3d at 792 (defendant robbed and killed victims); see CALCRIM 725; CALJIC 8.81.10.

b. [§98.84] Retaliatory Killing

The elements of this special circumstance are: (1) a victim who has witnessed a crime and (2) testified in a criminal or juvenile proceeding; (3) the killing was intentional and (4) in retaliation for the victim's testimony. The evidence need only show that the victim was killed in retaliation for the act of testifying, regardless of the content of the testimony. *People v Bolter* (2001) 90 CA4th 240, 242, 108 CR2d 760.

10. [§98.85] Prosecutor, Judge, Government Official, or Juror Victim (Pen C §190.2(a)(11)–(13), (20))

The elements of these special circumstances are:

(1) A victim who was a juror (Pen C §190.2(a)(20)) or a local, state, or federal

- Prosecutor or former prosecutor (Pen C §190.2(a)(11)),
- Judge or former judge (Pen C §190.2(a)(12)), or
- Elected or appointed official or former official (Pen C §190.2(a)(13)).

(2) The killing was intentionally carried out.

(3) Retaliation for or prevention of the performance of the victim's official duties. See CALCRIM 726; CALJIC 8.81.11, 8.81.20 (instructions collapse intent and motive into a single element).

Proposition 115 added the requirement that the killing be intentional. This change is retroactive because it benefits defendants. *Tapia v Superior Court* (1991) 53 C3d 282, 300, 279 CR 592. The juror-victim provision was added by Propositions 195 and 196 in March 1996.

By their express terms, the statutory provisions also cover prosecutors, judges, and officials from other states. As to prosecution on both retaliation and prevention theories, see §98.82.

11. [§98.86] Especially Heinous, Atrocious, or Cruel Murder (Pen C §190.2(a)(14))

This special circumstance is unconstitutionally vague. *People v Sanders* (1990) 51 C3d 471, 520, 273 CR 537; *People v Superior Court* (Engert) (1982) 31 C3d 797, 806, 183 CR 800; see *Maynard v Cartwright* (1988) 486 US 356, 108 S Ct 1853, 100 L Ed 2d 372.

Propositions 195 and 196, which passed in March 1996, made minor changes in this subsection. Most judges are of the view that these were cosmetic and do not revive the special circumstance.

☛ JUDICIAL TIP: Judges should strongly consider granting a motion to strike this special circumstance because allowing it to go to the jury courts reversal. See *Brown v Sanders* (2006) 546 US 212, 220–221, 126 S Ct 884, 163 L Ed 2d 723 (sentence invalid unless one of the other sentencing factors enables sentencer to give aggravating weight to same facts and circumstances).

Valid statutory provisions cover many particularly atrocious killings. See, *e.g.,* Pen C §190.2(a)(16) (murder because of race, color, etc.),

(17)(B)–(L) (murder while engaged in kidnapping, rape, etc.), (18) (infliction of torture), (19) (murder by poison), (21) (drive-by shooting).

12. Lying in Wait (Pen C §190.2(a)(15))

a. [§98.87] Before March 8, 2000

Until March 8, 2000, Pen C §190.2(a)(15) made it a special circumstance to kill a victim intentionally "while lying in wait." The courts construed the meaning of lying in wait to include not only killing from ambush, but murders in which the killer's purpose, rather than his or her presence, was concealed and that involved the following circumstances: (1) an intentional murder, (2) "a concealment of purpose," (3) "a substantial period of watching and waiting for an opportune time to act, and" (4) "immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." *People v Michaels* (2002) 28 C4th 486, 516, 122 CR2d 285; *People v Morales* (1989) 48 C3d 527, 557, 257 CR 64. See CALCRIM 727; CALJIC 8.81.15.

"Watching and waiting" does not mean that the victim has to be watched; alertly waiting for the victim's arrival suffices. *People v Sims, supra,* 5 C4th at 433. Approaching the victim, speaking to him, saying he ought to kill the victim, and then stabbing him in the chest qualifies as a surprise attack. *People v Hillhouse* (2002) 27 C4th 469, 500, 117 CR2d 45. A killer who hides outside the victim's apartment, then crosses the building's parking lot, enters the apartment, and murders the victim satisfies the immediacy requirement. *People v Michaels, supra,* 28 C4th at 486.

Physical concealment is not necessary. *People v Arellano* (2004) 125 CA4th 1088, 1095, 23 CR3d 172. The element of surprise is not negated by defendant's repeated threats and warnings. 125 CA4th at 1094–1095. Defendant need not watch and wait for any particular time period. See *People v Moon* (2005) 37 C4th 1, 23, 32 CR3d 894 (90 seconds between return of victim and murder). The statute applies to those who aid and abet a lying-in-wait special circumstances murder. *People v Bonilla* (2007) 41 C4th 313, 331, 60 CR3d 209.

The killing must take place during the period of concealment and watchful waiting; "during" means "at some point in the course of." *People v Lewis* (2008) 43 C4th 415, 512–514, 75 CR3d 588 (murders one to three hours after forcible kidnappings are not murders while lying in wait).

Any overlap between this special circumstance and premeditation does not make the special circumstance unconstitutional. *People v Stevens* (2007) 41 C4th 182, 203, 59 CR3d 196.

b. [§98.88] Beginning March 8, 2000

Proposition 18, adopted by the voters on March 7, 2000, changed the word "while" in Pen C §190.2(a)(15) to "by means of." See CALCRIM 728; CALJIC 8.81.15.1. This change was designed to eliminate the immediacy requirement of this special circumstance. See Legislative Analyst's analysis of Proposition 18 in the Voter Information Guide:

> "This measure amends state law so that a case of first degree murder is eligible for a finding of a special circumstance if the murderer intentionally killed a victim "by means of lying in wait." In so doing, this measure replaces the current language establishing a special circumstance for murders committed 'while lying in wait.' This change would permit the finding of a special circumstance not only in a case in which a murder occurred immediately upon a confrontation between the murderer and the victim, but also in a case in which the murderer waited for the victim, captured the victim, transported the victim to another location, and then committed the murder."

The change does not render the special circumstance unconstitutionally vague. *People v Superior Court* (Bradway) (2003) 105 CA4th 297, 301, 129 CR2d 324.

c. [§98.89] Illustrations

Illustrations of evidence sufficient under the former and the present statute are:

- Defendant, driving on the highway, selects his victim, pulls up alongside of him prompting him to slow down, and shoots him. *People v Stevens* (2007) 41 C4th 182, 203, 59 CR3d 196.
- The defendant kills the victim in her apartment after concealing himself outside the building until the lights in the apartment go out and a confederate arrives with a getaway car. *People v Michaels* (2002) 28 C4th 486, 516, 122 CR2d 285.
- The defendant orders pizza delivered to a motel room and waits for the delivery man in order to rob and murder him. *People v Sims* (1993) 5 C4th 405, 432–433, 20 CR2d 537.
- The defendant in his truck follows two girls who are on foot, stops, says "Girls," and shoots them. *People v Edwards* (1991) 54 C3d 787, 804–805, 825, 1 CR2d 696.
- The defendant plans to rob and murder a street person, lures the victim to an isolated place, walks behind him, and kills the victim on arrival at the intended location. *People v Webster* (1991) 54 C3d 411, 424, 448, 285 CR 31.

- The defendant in the back seat of a car kills the victim in the front seat as planned when the accomplice has driven to a relatively isolated spot. *People v Morales* (1989) 48 C3d 527, 554–555, 257 CR 64. In accord: *People v Combs* (2004) 34 C4th 821, 853, 22 CR3d 61.

An illustration of evidence that was insufficient before March 8, 2000, but that would probably suffice now is the capture of a victim during a period of lying in wait, followed by an intentional killing of the victim several hours later. See *Domino v Superior Court* (1982) 129 CA3d 1000, 1011, 181 CR 486; §98.87.

d. [§98.90] Relation to Lying-in-Wait Murder

The substantive crime of murder by lying in wait (Pen C §189) overlaps the lying-in-wait special circumstance. See *People v Ceja* (1993) 4 C4th 1134, 1140 n2, 17 CR2d 375. The principal differences are:

- The special circumstance requires specific intent to kill; lying-in-wait murder only needs wanton and reckless intent to inflict injury likely to cause death. *People v Webster* (1991) 54 C3d 411, 448, 285 CR 31.
- For murders committed before March 8, 2000, the special circumstance applies only if the killing took place during or immediately after the period of watching and waiting. *People v Sims* (1993) 5 C4th 405, 20 CR2d 537; see §98.87. Penal Code §189 uses the wording "by means of" lying in wait, the wording adopted in March 2000 to define the special circumstance.

The prosecutor can try a murder charge on a lying-in-wait theory and also a lying-in-wait special circumstance; the jury must make decisions on both. See, *e.g., People v Edelbacher* (1989) 47 C3d 983, 1019–1023, 254 CR 586. However, during the penalty phase the jury can count lying in wait as an aggravating factor only once. See *People v Melton* (1988) 44 C3d 713, 768, 244 CR 867.

13. [§98.91] Hate Crime Murder (Pen C §190.2(a)(16))

This special circumstance requires proof of (1) an intentional murder (2) committed because of the victim's race, color, religion, nationality, or country of origin. See CALCRIM 729; CALJIC 8.81.16. The provision is not directed at free expression protected by the First Amendment and does not implicate defendant's First Amendment rights. *People v Lindberg* (2008) 45 C4th 1, 37, 82 CR3d 323.

The killing does not have to stem solely from the prohibited bias (*In re Sassounian* (1995) 9 C4th 535, 549 n11, 37 CR2d 446), but that bias must be a substantial factor. *People v Lindberg, supra*, 45 C4th at 38.

14. Felony Murder (Pen C §190.2(a)(17))

a. [§98.92] Elements

This special circumstance is similar to felony murder under Pen C §189; it applies to a murder that was committed (1) while defendant was engaged in the commission (or attempted commission) of a felony specified in Pen C §190.2(a)(17) or during the immediate flight afterward *and* (2) the purpose of the murder was to carry out or advance the commission of the felony; *i.e.,* the felony was not merely incidental to the murder. See *People v Mendoza* (2000) 24 C4th 130, 182, 99 CR2d 485; CALCRIM 730; CALJIC 8.81.17. The defendant must have had the specific intent to commit one of the enumerated felonies. See *People v Prince* (2007) 40 C4th 1179, 1259, 57 CR3d 543.

☛ JUDICIAL TIP: When giving CALCRIM 730 or CALJIC 8.81.17, make sure to state the two elements of the special circumstance conjunctively. See *People v Stanley* (2006) 39 C4th 913, 956, 47 CR3d 420; *People v Prieto* (2003) 30 C4th 226, 256, 133 CR2d 18 (error to use "or" instead of "and").

The second element is designed to exclude situations in which the defendant intended to commit murder and only incidentally committed one of the designated felonies. *People v Rundle* (2008) 43 C4th 76, 156, 74 CR3d 454; *People v Marshall* (1997) 15 C4th 1, 40–41, 61 CR2d 84; see *People v Raley* (1992) 2 C4th 870, 902, 8 CR2d 678. The second element does not require that the primary motivation for the murder be the furthering of the felony; a concurrent intent to kill and to commit an independent felony is sufficient. *People v Bolden* (2002) 29 C4th 515, 557–558, 127 CR2d 802; *People v Michaels* (2002) 28 C4th 486, 518, 122 CR2d 285. *Bolden* supersedes language in *People v Thompson* (1980) 27 C3d 303, 322, 165 CR 289, that defendant's "primary criminal goal" must be to kill. 29 C4th at 557–558. Some examples follow.

- It is not burglary-murder under subsection (a)(17) to break into the victim's house in order to kill the victim. See *People v Garrison* (1989) 47 C3d 746, 778, 254 CR 257; *People v Morris* (1988) 46 C3d 1, 31, 249 CR 119, disapproved on other grounds in 9 C4th 535, 545 n6 (special circumstance inapplicable when "primary criminal goal" is not to steal but to kill).
- A defendant who robs the victim of clothing and other personal property in an attempt to conceal the murder is not subject to a robbery-murder special circumstance. However, when the intent to steal is independent of the murder and not merely a means of concealing it, subsection (a)(17) applies. *People v Robertson* (1982) 33 C3d 21, 51–52, 188 CR 77. The independent purpose need not be the sole one. In *Robertson*, the defendant robbed rape-

murder victims of their underwear, partly to conceal their identity and partly because he collected such items. That qualified as a robbery-murder special circumstance. In contrast, taking a letter written to the victim by a store in order to have a memento of the killing does not form a basis for a robbery-murder special circumstance, which "applies to a murder in the commission of a robbery, not to a robbery committed in the course of a murder." *People v Marshall, supra,* 15 C4th at 41.

- The defendant killed the victim at the request of defendant's girlfriend and recruited a confederate by telling him he could have his choice of the victim's property. The confederate had the victim's earrings when he was arrested. The evidence sufficiently shows robbery-murder. *People v Michaels, supra*, 28 C4th at 518.
- The defendant shot the victim following a dispute and immediately after demanding the victim's car keys at gunpoint. This is sufficient evidence of robbery-murder. *People v Koontz* (2002) 27 C4th 1041, 1080, 119 CR2d 859.
- Robbery requires force or fear; when a defendant only decides to take the victim's property after killing the victim, this requirement is not met. See *People v DePriest* (2007) 42 C4th 1, 46, 63 CR3d 896. However, when the murderer is later found in possession of the victim's property, there is an inference that the victim was robbed. 42 C4th at 47.

In case of kidnap-murder and arson-murder involving specific intent to kill, the second element is eliminated. Pen C §190.2(a)(17)(M). See CALCRIM 731–732; CALJIC 8.81.17.1. Subsection (M) applies only to crimes committed on or after March 8, 2000. See Stats 1998, ch 628, §3, requiring voter approval for the change to become effective; Ballot Proposition 18 (March 7, 2000)

b. [§98.93] Intent To Kill

The actual killer need not have had an intent to kill as long as the murder was in furtherance of the felony. Pen C §190.2(a)(17), (b); see also discussion in *People v Bolden* (2002) 29 C4th 515, 560, 127 CR2d 802; *People v Thornton* (2007) 41 C4th 391, 436, 61 CR3d 461. A premeditated killing can be felony-murder. *People v Prince* (2007) 40 C4th 1179, 1262, 57 CR3d 543.

An aider and abettor who was not the actual killer must either (1) have had intent to kill (Pen C §190.2(c)) or (2) have acted "with reckless indifference to human life and as a major participant" in the commission of the designated felony. Pen C §190.2(d); *People v Bustos* (1994) 23 CA4th 1747, 1753, 29 CR2d 112.

The reckless-indifference provision was added by Proposition 115 and applies to murders committed after June 5, 1990. *Tapia v Superior Court* (1991) 53 C3d 282, 297–299, 279 CR 592.

"Reckless indifference to human life" is defined in CALCRIM 703 and CALJIC 8.80.1; the definitions are not identical. Neither CALCRIM, CALJIC, nor the courts have so far defined "major participant," a phrase that originated in *Tison v Arizona* (1987) 481 US 137, 107 S Ct 1676, 95 L Ed 2d 127 (defendants who orchestrated prison escape and subsequent robbery that led to killing of robbery victims by defendants' confederates are major participants).

☛ JUDICIAL TIP: Most judges recommend against defining "major participant" when instructing. See *People v Raley* (1992) 2 C4th 870, 901, 8 CR2d 678 (term "sadistic purpose" has no legal definition; jurors' common understanding of the term suffices).

c. [§98.94] Charge and Proof; When Barred

The prosecution must charge and prove the felony underlying the special circumstance beyond a reasonable doubt under the general law that applies to the trial and conviction of that crime. Pen C §190.4(a). Felony murder itself, as differentiated from a special circumstance, may be charged simply as murder with malice. *People v Moore* (2011) 51 C4th 386, 412, 121 CR3d 280; *People v Brasure* (2008) 42 C4th 1037, 1057, 71 CR3d 675. For example, in a rape-murder capital case the prosecution may charge murder with malice, without specifying the rape, and may separately charge the rape and the special circumstance of murder in the commission of rape. *People v Kipp* (2001) 26 C4th 1100, 1131, 113 CR2d 27.

Felony murder and premeditated murder need not be pleaded separately and the jury need not unanimously agree on a theory of first degree murder as either felony or premeditated murder. *People v Morgan* (2007) 42 C4th 593, 617, 67 CR3d 753; *People v Nakahara* (2003) 30 C4th 705, 712, 134 CR2d 223.

The corpus delicti of a special circumstance under Pen C §190.2(a)(17) need not be proved independently of a defendant's extra-judicial statement. Pen C §190.41. See *People v Jablonski* (2006) 37 C4th 774, 825–828, 38 CR3d 98 (statute does not violate Eighth Amendment).

Prosecution of the special circumstance is not barred by expiration of the statute of limitations that applies to the underlying felony. *People v Gurule* (2002) 28 C4th 557, 637, 123 CR2d 345; *People v Morris* (1988) 46 C3d 1, 14, 249 CR 119 (disapproving *People v Superior Court (Jennings)* (1986) 183 CA3d 636, 647, 228 CR 357). However, when double jeopardy bars prosecution of the felony, it also blocks trial of a special circumstance based on that felony. *People v McDonald* (1984) 37

C3d 351, 378, 208 CR 236, overruled on other grounds in 23 C4th 896, 914.

Penal Code §190.2 does not preclude the jury from finding more than one felony murder special circumstance for each homicide. *People v Morgan*, *supra*, 42 C4th at 622.

15. [§98.95] Torture (Pen C §190.2(a)(18))

This subsection creates a special circumstance for a murder that was intentional and included infliction of torture. *People v Chatman* (2006) 38 C4th 344, 391, 42 CR3d 621; CALCRIM 733; CALJIC 8.81.18. The requisite torturous intent is the same as for the substantive crime of torture (Pen C §206): an intent to cause cruel or extreme pain and suffering for revenge, extortion, persuasion, or any other sadistic purpose. *People v Elliot* (2005) 37 C4th 453, 479, 35 CR3d 759; see *People v Mungia* (2008) 44 C4th 1101, 1136–1137, 81 CR3d 614 (hitting robbery victim repeatedly in head with blunt instrument does not show intent to torture). An actual act of torture is an essential element of this special circumstance. *People v Jennings* (2010) 50 C4th 616, 675–676, 114 CR3d 133. Enforced starvation is torture. 50 C4th at 684.

☛ JUDICIAL TIP: When giving CALJIC 8.81.18, include the third element. When giving CALCRIM 733, use alternative 4B. See 50 C4th at 676.

The following matters are *not* elements of torture as a special circumstance:

- The victim's awareness of the pain. *People v Davenport* (1985) 41 C3d 247, 260, 221 CR 794.
- *Premeditated and deliberate* intent to torture. *People v Elliot* (2005) 37 C4th 453, 476–479, 35 CR3d 759; *People v Cole* (2004) 33 C4th 1158, 1226, 17 CR3d 532 (italics in original).
- A causal relationship between the acts of torture and death. *People v Crittenden* (1994) 9 C4th 83, 141–142, 36 CR2d 474. In this respect the torture special circumstance differs from torture-murder under Pen C §189. *People v Crittenden, supra.* Such an intent is required for torture-murder under Pen C §189. *People v Chatman, supra,* 38 C4th at 389.

The other major difference between the special circumstance and the substantive offense is that only the former requires a specific intent to kill. *People v Cook* (2006) 39 C4th 566, 602, 47 CR3d 22; *People v Proctor* (1992) 4 C4th 499, 535, 15 CR2d 340, aff'd 512 US 967, 114 S Ct 2630, 129 L Ed 2d 750.

☛ JUDICIAL TIP: At the penalty phase, the judge should instruct against double-counting on request when the jury convicted defendant of torture-murder and also found the torture special circumstance to be true. See §98.61.

16. [§98.96] Poison (Pen C §190.2(a)(19))

The elements of the murder-by-poison special circumstance are: (1) an intentional murder (2) committed by administering poison. Pen C §190.2(a)(19). This special circumstance requires proof that defendant administered the poison with intent to kill the victim. *People v Catlin* (2001) 26 C4th 81, 154, 109 CR2d 31. See *People v Blair* (2005) 36 C4th 686, 746, 31 CR3d 485 (when there is evidence that defendant intended only to injure victim, second degree murder is lesser included offense). CALCRIM 734 and CALJIC 8.81.19 adequately convey this requirement; no additional instruction is needed.

☛ JUDICIAL TIP: Do not tell the jury that a particular substance is a poison unless there is no dispute about it. When there is a dispute, define poison for the jury. CALCRIM 734 and CALJIC 8.81.19 include definitions. When there is no dispute, get a stipulation.

Jury rejection of this special circumstance does not prevent a guilty verdict of murder perpetrated by poison. *People v Jennings* (2010) 50 C4th 616, 639, 114 CR3d 133 (elements differ).

17. [§98.97] Juror Victim (Pen C §190.2(a)(20))

This special circumstance is discussed in §98.85; for instructions, see CALCRIM 726; CALJIC 8.81.20.

18. [§98.98] Drive-By Shooting (Pen C §190.2(a)(21))

This special circumstance was added by Propositions 195 and 196 in June 1996 in identically worded sections. The special circumstance probably applies only to murders committed after the voters adopted Propositions 195 and 196. Concurrently, Pen C §189 was amended to add a substantive offense of drive-by shooting murder, nearly identical to the special circumstance. The duplication does not make the special circumstance invalid. *People v Rodriguez* (1998) 66 CA4th 157, 164–165, 77 CR2d 676 (court also rejected several other challenges to constitutionality of Pen C §190.2(a)(21), but left unresolved question of whether failure to require premeditation invalidates this special circumstance).

Penal Code §190.2(a)(21) refers to intent three times:

- It requires an intentional murder.

- It requires the murder to be "perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person . . . ."
- It requires that the shooting be "with the intent to inflict death."

19. [§98.99] Murder by Active Participant in Street Gang (Pen C §190.2(a)(22))

This special circumstance was added by Proposition 21, effective March 8, 2000. Its elements are (Pen C §190.2(a)(22)):

1. The defendant intentionally killed the victim. Shooting with intent to kill one person but killing the victim instead is an intentional killing within Pen C §190.2(a)(22). *People v Shabazz* (2006) 38 C4th 55, 40 CR3d 750.

2. The defendant was an active participant in a criminal street gang at the time of the killing.

3. The murder was carried out to further the activities of the criminal street gang.

For the definition of a "criminal street gang," see Pen C §§186.22(e), (f), 190.2(a)(22); CALCRIM 736; CALJIC 8.81.22. An active participant is one whose involvement is more than nominal or passive. *People v Castenada* (2000) 23 C4th 743, 752, 97 CR2d 906. Active participation requires knowledge of and an intent to further the goals of the gang. 23 C4th at 749. As to admitting opinion evidence by gang experts, see *People v Ward* (2005) 36 C4th 186, 209–211, 30 CR3d 464; *People v Gardeley* (1996) 14 C4th 605, 617, 59 CR2d 356.

In all capital cases "courts must exercise caution in admitting evidence that a defendant is a member of a gang because such evidence may be highly inflammatory and may cause the jury to 'jump to conclusion' that the defendant deserves the death penalty." *People v Lewis* (2008) 43 C4th 415, 499 , 75 CR3d 588.

V. FORMS

A. Jury Questionnaires

(*Note:* Following are two examples of possible jury questionnaires. Other variations may be used, and the examples set forth here may be adapted to suit particular needs.)

1. [§98.100] Sample Form: Jury Questionnaire A

This questionnaire is designed to elicit information with respect to your qualifications to sit as a juror in the pending case. By the use of the questionnaire, the process of jury selection will be substantially shortened. Please respond to the following questions as completely as possible. The information contained in this questionnaire will become part of the court's permanent record and therefore a public document. If you cannot answer a question, please leave the response area blank. During the questioning you will be given an opportunity to explain or expand any answers if necessary.

Some of these questions may call for information of a personal nature that you may not want to discuss in public, *i.e.,* in an open court with the press and/or the public present. In any instance where you feel your answer may invade your right to privacy or might be embarrassing to you, you may indicate by placing your initials to the right of the question. The court will then give you an opportunity to explain your request at the bench with only the court, counsel, and the court reporter present.

Because this questionnaire is part of the jury selection process, you must answer the questions under penalty of perjury, and you must fill out the questionnaire by yourself, without any help and/or assistance from any other person.

If you wish to make further comments regarding any of your answers, please do so on the back sides of the pages of your questionnaire.

As you answer the questions that follow, please keep in mind that there are no "right" or "wrong" answers, only complete and incomplete answers. Complete answers are far more helpful than incomplete answers because they make long and tiresome questioning unnecessary and by doing that they shorten the time it takes to select a jury.

Thank you for your cooperation.

_____

Judge of the Superior Court

JUROR QUESTIONNAIRE A

PLEASE MAKE CERTAIN THAT YOUR ANSWERS ARE LEGIBLE

I

GENERAL INFORMATION

1. Full Name:

   (a) Sex:

   (b) Date of Birth:

2. Part of town currently residing in (not specific address):

   (a) Length of time at current address:

   (b) Past residences—in or out of state within the past ten years:

   City or general area:

3. Current occupation and employment:

4. (a) Please list all prior places of employment, the geographic area, length of time at each, and position for each for the past ten years.

   (b) If you are retired, please list all former occupations.

5. Have you ever served in the armed forces? If so, please answer the following:

   (a) Branch and highest rank:

   (b) Dates:

   (c) Duties:

   (d) Any involvement in the military police or the military justice system? If so, please explain:

6. Current marital status (single, married, divorced, widowed, separated):

7. Please list the names of children, ages, and if employed, nature of work and location of employment. Please list occupation of children.

8. How long have you been married?

9. Regarding your spouse (or significant other person living with you):

(a) What is your spouse's current occupation?

(b) Name and location of spouse's current employer; length of occupation and job description:

(c) If you have been previously married, what was your former spouse's occupation?

10. Has your spouse, or any former spouse, had any legal training?

If so, please explain.

11. State the level and extent of your education (and any major areas of study that you have had).

12. Have you had any legal or medical training?

If so, please explain.

13. Have you or any close friend or relative ever visited any jail, prison, or juvenile detention facility? If yes, please explain.

14. Are you or any close friend or relative associated with any federal, state, or local law enforcement agency or other government office such as district attorneys or judges?

15. Are you or any close friend or relative associated with any attorney who practices criminal law or any individual who practices psychology or psychiatry?

16. (a) Have you or any of your relatives, or any of your close friends, ever been a victim of a crime? If so, please explain.

(b) Have you, or any close friend, or relative ever been involved in any criminal matter or case either as a *suspect, defendant, witness, or other*? If yes, please explain.

17. Have you ever served on a federal or local grand jury? If so, please state the nature of the jury as well as where and when you served.

18. Have you ever served on a trial jury in a federal or state court? Where and when?

19. Without disclosing the result, was the trial jury in which you served able to reach a verdict?

20. Did the matter or matters involve a criminal prosecution or were they civil in nature?

If criminal, please state the nature of the offense or offenses involved:

21. Is there a crime prevention group in your neighborhood and, if so, do you participate in it?

22. Do you own any weapons? If so, what type? Have you ever used any weapon for any purpose? If so, when? For what purpose?

23. Do you have any specific health problems of a serious nature that might make it difficult for you to sit as a juror in this case? Please describe them.

24. Are you taking any medication regularly that might make it difficult for you to concentrate? If so, state what type of medication.

25. Do you have any pressing business or is there anything pressing in your personal life that might cause you to wish to expedite the process of decision making in the jury room?

26. Would you characterize yourself as a leader or a follower?

27. Will you have any difficulty following the law as given to you by the judge, even if you may disagree with it?

28. Do you have any feelings against the defendant solely because the defendant is charged with this particular offense?

29. Does the mere fact that information was filed against the defendant cause you to conclude that the defendant is more likely to be guilty than not guilty?

30. Do you know anything about this case other than what you have heard in open court?

31. Are you acquainted with the prosecutor, the defense attorney, or the defendant?

32. What, if anything, have you already learned about this case or about the defendant?

(a) Where did you learn this?

(b) Did this information make you favor the prosecution or the defense? Please explain:

33. What newspapers and periodicals do you read frequently?

(a) What portion(s) do you read? (For example: Front page? Sports? Editorials? Crime stories?)

(b) Do you try to follow major crime stories? ❑ YES ❑ NO

(c) What is the last book you have read?

34. What radio and television news broadcasts have you heard or seen frequently during the past year?

Did you follow any criminal cases in the news? ❑ YES ❑ NO

(a) Which case(s)?

(b) What did you learn about these cases?

35. Which are the most serious criminal cases you have followed in the media during the past year?

36. Do you try to follow stories about the functioning of the criminal justice system? ❑ YES ❑ NO

37. If the court instructs you not to read, view, or discuss any news media coverage of this case, will you follow the court's instructions? ❑ YES ❑ NO

38. Do you do any type of civic, club, organizational, or other volunteer work?

39. What are your hobbies or interests besides work or family?

40. Do you belong to any type of civic, social, religious, youth, school, or professional organizations? Describe the group and your involvement:

41. Do you subscribe to or regularly read any newspaper or periodicals? If so, please list them:

42. What magazines do you read, whether you subscribe to them or not?

43. Have you ever written a letter to the editor? If so, what publication and what was it about?

44. Do you have any specific problems at home or on the job that might make you lose your concentration during the trial?

45. Are you willing, as a juror, to stay as long as is necessary to reach a verdict in a case that may last longer than estimated by the court or counsel?

46. Will you have any difficulty keeping an open mind until you have heard all the evidence and you have heard all the arguments of both counsel, and the court has given you all the instructions?

47. A party, attorney, or witness may come from a particular national, racial, or religious group or have a lifestyle different from your own. Would that fact affect your judgment or the weight and credibility you would give to his or her testimony?

48. Each attorney has the right to object to offered evidence and testimony. Would you disfavor the attorney or that side of the case if he or she objected to evidence?

49. Each attorney has the right to excuse prospective jurors without showing cause. Would you disfavor the attorney or that side of the case if he or she excused a prospective juror?

50. You will be given instructions by the court about the rules that apply to this case. Do you feel that you will be able to follow those rules with which you do not agree?

51. Have you, or any close friend or relative, ever undergone treatment or care provided by a psychiatrist or psychologist? If so, please describe.

52. Do you know any reason why you would not be a completely fair and impartial juror in this case?

II

ATTITUDES REGARDING THE DEATH PENALTY

The court is asking these questions regarding your feelings about the death penalty because one of the possible sentences for a person convicted of the charges the prosecution has filed is the death penalty and therefore the court must know whether you could be fair to both the prosecution and the defense on the issue of punishment *if you reach that issue.* By asking these questions, the court is not suggesting that you will ever need to decide this question, because the court has no way of knowing what the evidence in this case will be or whether or not you will find the defendant guilty of anything at all.

53. What are your GENERAL FEELINGS regarding the death penalty?

54. What are your feelings on the following specific questions:

(a) Do you feel that the death penalty is used too often? Too infrequently? Please explain:

(b) Do you belong to any group(s) that advocate(s) the increased use or the abolition of the death penalty? ❑ YES ❑ NO

1. What group(s)?

2. Do you share the views of this group(s)?

3. How strongly do you hold these views?

(c) Is your view in answers (a) and (b) based on a religious consideration? ❑ YES ❑ NO

55. In a death penalty case, there may be two separate phases or trials, one on the issue of guilt and the other on penalty. The first phase is called the “guilt” phase, where the jury decides on the issue of guilt as to the charges against the defendant and the truth of any alleged special circumstance(s). The second phase is called the “penalty” phase. If, and only if, in the guilt phase, the jury finds the defendant guilty of first degree murder (which will be defined at trial) and further finds one or more of any alleged special circumstances to be true, then and only then would there be a second phase or trial in which the same jury would determine whether the penalty would be death or life imprisonment without possibility of parole. (A special circumstance is an alleged description which relates to the charged murder, upon which the jury is to make a finding. For example, was the murder committed in the commission of certain felonies such as robbery, rape, or other enumerated offenses, or was the murder an

intentional killing of a peace officer in the course of the performance of duty, etc.)

The jury determines the penalty in the second phase by weighing and considering certain enumerated aggravating factors and mitigating factors (bad and good things) that relate to the facts of the crime *and* the background and character of the defendant, including a consideration of mercy. An aggravating factor is any fact, condition, or event attending the commission of a crime that increases its guilt or enormity, or adds to the injurious consequence which is above and beyond the elements of the crime itself. A mitigating circumstance is any such fact, justification, or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. The weighing of these factors is not quantitative, but qualitative; in order to fix the penalty of death, the jury must be persuaded that the aggravating factors are *so substantial* in comparison with the mitigating factors, that death is warranted instead of life imprisonment without parole.

Based on the above:

(a) Assume for the sake of this question only that, in the guilt phase, the prosecution has proved first degree murder beyond a reasonable doubt and you believe the defendant is guilty of first degree murder. Would you, because of any views that you may have concerning capital punishment, refuse to find the defendant guilty of first degree murder, even though you personally believed the defendant to be guilty of first degree murder, just to prevent the penalty phase from taking place?

(b) Assume for the sake of this question only that, in the guilt phase, the prosecution has proven one or more special circumstances to be true beyond reasonable doubt, and you personally believe the special circumstance(s) to be true. Would you, because of any views that you may have concerning capital punishment, refuse to find the special circumstance(s) true, even though you personally believed it (them) to be true, just to prevent the penalty phase from taking place?

(c) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more special circumstances to be true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, *automatically refuse* to vote in favor of the penalty of death and *automatically vote* for a penalty of life imprisonment without the possibility of parole, without considering any of the evidence of any of the aggravating and mitigating factors (about which you will be instructed) regarding the facts of the crime and the background and character of the defendant?

(d) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, *automatically refuse* to vote in favor of the penalty of life imprisonment without the possibility of parole and *automatically vote* for a penalty of death, without considering any of the evidence, or any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant?

(e) If your answer to either question (c) or question (d) was "yes," would you change your answer if you are instructed and ordered by the court that you must consider and weigh the evidence and the above mentioned aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant, before voting on the issue of penalty?

(f) Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you?

56. Will you have any difficulty keeping from discussing the case with anyone until it is submitted to you for your decision and then only discuss the case with all the other jurors in the jury room?

I, _____, declare under penalty of perjury that the foregoing answers set forth on pages __ through __ (and the back of such pages) of the within Jury Questionnaire are true and correct to the best of my knowledge and belief.

_____, California

_____ _____

(Date) (Signature)

_____

(Print Name)

2. [§98.101] Sample Form: Jury Questionnaire B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF _____

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
_____	)	
Plaintiff,	)	Case No. _____
vs.	)	
_____	)	JUROR
Defendant,	)	QUESTIONNAIRE
_____	)	

This Questionnaire is designed to obtain information regarding your qualifications to sit as a juror in a pending criminal case. By the use of the Questionnaire, the process of jury selection will be substantially shortened.

It is not our intent to embarrass anyone. These questions could be asked in open court. The answers you give here will become part of the Court's public record and will be used by the judge and attorneys to assist in selecting a qualified jury. Rather than answering in writing, however, you have the right to request a private hearing with the judge and attorneys to answer specific sensitive questions. Mark such a question "Confidential."

Your answers must be given without consulting any other person, *must be completed under penalty of perjury,* and must be printed in black pen.

PLEASE GIVE COMPLETE ANSWERS UNDER OATH:

1. Name _____ Age ___ Sex:___ ❑ M ❑ F
(First) (Middle) (Last)

2. Race: ❑ Caucasian ❑ Spanish/Hispanic ❑ Black ❑ Asian ❑ American Indian

❑ Other (specify) _____

3. Area of residence _____

Years there _____

4. Years of residence in _____ County ____ , California ____

5. Occupation _____

Employer _____

Years there _____ General location _____

Your duties _____

6. Status: ❑ Single ❑ Married ❑ Divorced

❑ Widowed ❑ Living with another

7. Other's occupation _____

Employer _____

Years there _____ General location _____

8. Your children: number of boys _____ ages _____

number of girls _____ ages _____

Occupations (if student, area of study) _____

_____

EDUCATION

9. What is your highest level of education? _____

List any degrees, licenses, or certifications you have:

_____

Are you currently attending school? ❑ YES ❑ NO

If so, area of study? _____

MILITARY SERVICE

10. Have you served in the military forces? ❑ YES ❑ NO

If so, what were your duties? _____

_____

Were you ever in combat? ❑ YES ❑ NO If so, where?

_____

KNOWLEDGE OF PARTICIPANTS

11. **Do you know:** defendant(s): ❑ YES ❑ NO

defendant's family: ❑ YES ❑ NO

the prosecutor: ❑ YES ❑ NO

any prospective witnesses: ❑ YES ❑ NO

defense counsel: ❑ YES ❑ NO

any other jurors here: ❑ YES ❑ NO

If so, whom do you know? _____

_____

EXPERIENCE WITH CRIMINAL JUSTICE SYSTEM

12. Do you know any person connected to the *court system,* such as a lawyer, judge, bailiff, clerk, or reporter? ❑ YES ❑ NO

If YES, who are they and where do they practice? _____

_____

13. Have you*, a close friend, or relative* ever been a VICTIM of a crime? ❑ YES ❑ NO

If yes, who? _____

What crime(s) _____ When? _____

What happened? _____

_____

Was anyone caught? ❑ YES ❑ NO

Was there a trial? ❑ YES ❑ NO

If so, did you attend the trial? ❑ YES ❑ NO

How do you feel about the response of law enforcement? _____

_____

How do you feel about the response of the judicial system? _____

_____

14. Have *you*, *a close friend, or relative* ever been a WITNESS to a crime? ❑ YES ❑ NO If yes, who? _____

_____

What crime (s) _____ When? _____

What happened? _____

Was anyone caught? ❑ YES ❑ NO

Was there a trial? ❑ YES ❑ NO

If so, did you attend the trial? ❑ YES ❑ NO If so, how do you feel about the trial? _____

15. Have *you, a close friend, or relative* ever been ACCUSED of a crime, even if the case did not come to court? ❑ YES ❑ NO

If yes, who? _____

What crime(s) _____

What happened? _____

When? _____ Was there a trial? ❑ YES ❑ NO

If so, did you attend the trial? ❑ YES ❑ NO

If so, how do you feel about what happened? _____

_____

16. Do *you* or does *a close friend or relative* have any law enforcement experience (police, sheriff, highway patrol, FBI, postal inspector, military police)? ❑ YES ❑ NO If yes, what are their names and relationship to you? _____

_____

PRIOR JURY EXPERIENCE

17. Have you ever served on a jury before? ❑ YES ❑ NO If yes:

(a) Was the jury deciding a **CRIMINAL MATTER**?
❑ YES ❑ NO

If yes:

What were the charges? _____

What were the facts? _____

Did the jury arrive at a verdict? ❑ YES ❑ NO

If not, why? _____

Did anything occur during the trial(s) that would cause you

to be reluctant to serve here? ❑ YES ❑ NO If yes, what?

_____

(b) Was the jury deciding a **CIVIL MATTER**? ❑ YES ❑ NO

If yes:

What kind of case (contract, accident, violent injury)?

_____ _____

Was a verdict reached? ❑ YES ❑ NO If not, why? _____

_____

Do you recognize that in a civil case the burden of proof is only a preponderance of the evidence, but that in a *criminal case* the defendant is presumed to be innocent and the People must prove guilt beyond a reasonable doubt? ❑ YES ❑ NO

(c) Did you serve on a GRAND JURY? ❑ YES ❑ NO

Charges? _____

THE CHARGES HERE

18. Do you have any feeling about the *nature of the charges* in this case that would make it difficult or impossible for you to be fair and impartial? ❑ YES ❑ NO

If so, what? _____

19. Do you have any *religious or moral feeling* that would make it difficult or impossible for you to sit in judgment of another person? ❑ YES ❑ NO If so, please explain _____

20. Did you *know anything about this case* before you came into the courtroom? ❑ YES ❑ NO

If so, what? _____

CRIMES OF VIOLENCE

21. Would you be *reluctant to serve* as a juror on a crime involving acts of violence and where graphic photographs of the victim will be in evidence? ❑ YES ❑ NO

If so, why? _____

22. Do you or does any close friend or relative *own a gun*?
❑ YES ❑ NO

If so, what kind of gun and who owns it?

_____

23. Have you ever *fired a gun?* ❑ YES ❑ NO If so, why? _____

_____

24. Have you or has any close friend or relative ever been involved in a situation in which a *gun was used* in a deadly or dangerous manner?
❑ YES ❑ NO

If so, what happened? _____

_____

25. Do you have a close friend or relative who has *died* from other than NATURAL CAUSES? ❑ YES ❑ NO

If so, what happened? _____

26. Have you ever belonged to an organization that has as one of its principle aims the *passage of any law* in the area of gun control (*e.g.,* the NRA)? ❑ YES ❑ NO

ATTITUDES TOWARD CAPITAL PUNISHMENT

Questions concerning your views on the death penalty are required by law. The asking of them is not meant to imply that the defendant is guilty or that you will in fact ever be called on to decide the penalty in this case. If you find the defendant not guilty, the trial will end and your beliefs about the death penalty will not be relevant. If you find the defendant guilty and

the special circumstances to be true, then there will be a second phase of the trial to determine whether the penalty will be death or life in prison without the possibility of parole.

27. Which would you say most accurately states your philosophical opinion regarding the death penalty?

❑ Strongly in favor ❑ Moderately in favor

❑ Strongly against ❑ Moderately against

❑ Neutral

28. No matter what the evidence shows, would you *refuse to vote for guilt* as to first degree murder or refuse to find the special circumstances true in order to keep the case from going to the penalty phase, where death or life in prison without the possibility of parole is decided? ❑ YES ❑ NO

29. No matter what the evidence shows, would you *always vote guilty* as to first degree murder and true as to the special circumstances in order to get the case to the penalty phase, where death or life in prison without the possibility of parole is decided? ❑ YES ❑ NO

30. If the jury found a defendant guilty of intentional first degree murder and found a special circumstance to be true, would you *always vote against death,* no matter what other evidence might be presented at the penalty hearing in this case? ❑ YES ❑ NO

31. If the jury found a defendant guilty of intentional first degree murder and found a special circumstance to be true, would you *always vote for death*, no matter what other evidence might be presented at the penalty hearing in this case? ❑ YES ❑ NO

32. Do you feel that the State of California should *automatically put to death* everyone who:

A. kills another human being? ❑ YES ❑ NO

B. Is convicted of murder? ❑ YES ❑ NO

C. Is convicted of multiple murder? ❑ YES ❑ NO

D. Is convicted of murder plus . . . . ? ❑ YES ❑ NO

33. What purpose do you feel that the death penalty serves?

_____

_____

34. The trial of a defendant charged with an offense that may result in the death penalty is different from all other trials. First, the jury must decide (1) whether or not the defendant is guilty of first degree murder and (2) whether or not a special circumstance is true. Only then is the jury required to decide the sentence of the defendant, based on additional evidence. In that situation:

    A. Do you understand that one of the choices is the death penalty? ❑ YES ❑ NO

    B. Do you understand that the only other choice is life in prison *without* the possibility of parole? ❑ YES ❑ NO

35. Do you believe that *background information* about a defendant is something relevant to the jury's consideration of penalty?

❑ Probably ❑ Possibly ❑ Unsure

Please explain: _____

_____

36. Overall, in considering general issues of punishment, which do you think is *worse for a defendant:*

❑ Death ❑ Life in prison without possibility of parole

Please explain: _____

_____

When a judge sentences a defendant to life in prison without possibility of parole, what does that *mean to you?* _____

_____

37. Do you feel that life in prison without the possibility of parole is a *severe punishment?*
❑ YES ❑ NO Why? _____

38. Do you feel that the death sentence is imposed:

❑ Too often ❑ Too seldom ❑ Randomly

❑ About right

Please explain: _____

39. Why do you hold the *opinion* that you do regarding the death penalty?

_____

40. Have you ever thought about whether you were *for or against* the death penalty before coming to court? ❑ YES ❑ NO

Was there something specific that caused you to evaluate your opinion at that time? If so, what was it? _____

41. The murders alleged in this case involve the special circumstances of . . . . . Do you think that, depending on the circumstances of this case and the evidence to be presented in the penalty phase, if any, *you could impose the death penalty* in such a case? ❑ YES ❑ NO

42. If your opinion about the death penalty has *changed over the years,* please explain why: _____

43. Are you a member of any organization or association that advocates or takes a *position for or against* the death penalty?

❑ YES ❑ NO If so, which one: _____

44. What is the view, if any, of your *religious organization* concerning the death penalty? _____

Do you feel obligated to accept that view? ❑ YES ❑ NO

If yes, explain why: _____

45. Would you be able to follow an instruction by the Court to refrain from *discussing the question* of the death penalty during the trial of this case until the penalty phase is concluded? ❑ YES ❑ NO

46. There are no circumstances under which a jury is instructed by the court to return a verdict of death. No matter what the evidence shows, the jury is always given the option in the penalty phase of choosing life without the possibility of parole.

(a) Given the fact that you will have two options available to you, can you see yourself, in the appropriate case, *rejecting the death penalty* and choosing life imprisonment without the possibility of parole instead? ❑ YES ❑ NO

(b) Given the fact that you have two options available to you, can you see yourself, in the appropriate case, *rejecting life imprisonment* without the possibility of parole and choosing the death penalty instead? ❑ YES ❑ NO

47. Regarding the statement: "Anyone who intentionally kills another person should always get the death penalty." Do you

❑ Strongly agree ❑ Strongly disagree

❑ Agree somewhat ❑ Disagree somewhat

Please explain: _____

_____

48. Regarding the statement: "Anyone who intentionally kills another person should never get the death penalty." Do you

❑ Strongly agree ❑ Strongly disagree

❑ Agree somewhat ❑ Disagree somewhat

Please explain: _____

_____

EVALUATING TESTIMONY

If you are selected as a juror in this case, you will be a judge of the facts of the case. You must expect that you will *hear different versions of the facts* presented by the witnesses. Among the things that you may consider in determining the believability of a witness are these:

A. The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

B. The ability of the witness to remember or to communicate any matter about which the witness has testified;

C. The character and quality of that testimony;

D. The demeanor and manner of the witness while testifying;

E. The existence or nonexistence of a bias, interest, or other motive;

F. The attitude of the witness toward the action in which testimony has been given by the witness or toward the giving of testimony;

G. A statement previously made by the witness that is consistent or inconsistent with the testimony of the witness;

H. The character of the witness for honesty or truthfulness or their opposites;

I. An admission by the witness of untruthfulness;

J. The witness's prior conviction of a felony.

49. Would you have any difficulty applying *these same standards* to judge the credibility of every witness regardless of who that witness is? ❑ YES ❑ NO If yes, why? _____

50. If *peace officers testify,* will you apply these same standards in evaluating their testimony as you would in evaluating the testimony of any other witness? ❑ YES ❑ NO If not, why? _____

_____

51. Do you believe that it is *possible* that a peace officer might not tell the truth? ❑ YES ❑ NO

Why?_____

52. Do you believe that it is possible for any witness to swear to tell the truth and yet *lie under oath?*

❑ YES ❑ NO Why? _____

53. Do you believe that even if someone lies under oath in court he or she could have told the *truth on some former occasion?*
❑ YES ❑ NO

If not, why? _____

_____

54. Have you, a close friend, or relative ever had an *unpleasant experience* with a peace officer? ❑ YES ❑ NO

If yes, what? _____

55. Have you ever had any *positive experiences* with a peace officer?

❑ YES ❑ NO If so, what? _____

_____

56. Do you feel that if the defendant chooses to testify in this case, that testimony should be judged by *different standards* merely because he or she is the accused? ❑ YES ❑ NO

If yes, why? _____

57. Would you find the defendant guilty simply because he or she is *charged* with having committed a crime? ❑ YES ❑ NO

58. Would you evaluate a defendant's denial by the same standards used to judge any other witness in order to determine whether or not it raises a reasonable doubt? ❑ YES ❑ NO

59. Does the fact that any defendant may have been *arrested* or placed in custody cause you to have any bias or prejudice against him or her or sympathy for him or her? ❑ YES ❑ NO

If so, why? _____

60. Can you set aside any *sympathy, bias, or prejudice* you might feel toward any victim, witness, or defendant? ❑ YES ❑ NO

If not, why? _____

_____

61. It may appear that one or more of the parties, attorneys, or witnesses come from a *particular national, racial, or religious group.* Would this in any way affect your judgment or the weight you would give to their testimony? ❑ YES ❑ NO

If yes, why? _____

_____

62. Can you be fair and impartial towards persons whose *lifestyles* differ considerably from your own? ❑ YES ❑ NO

If not, why? _____

63. Would you find a defendant *guilty of the charges* here merely because the evidence showed some involvement in the use or sale of a narcotic substance? ❑ YES ❑ NO

If so, why? _____

64. Would you reject the testimony of *any witness* merely because the evidence showed some involvement in the use or sale of a narcotic substance? ❑ YES ❑ NO

If so, why? _____

_____

65. Have you, a close friend, or relative ever had a *problem* involving the use of narcotics? ❑ YES ❑ NO

If so, what happened? _____

66. Do you have any strong personal or philosophical views about the *narcotics laws* of this country so as to impair your ability to render a fair and impartial verdict in this case? ❑ YES ❑ NO

If so, what? _____

67. Are you willing to try to *resolve conflicts* in the evidence and decide which evidence is to be believed? ❑ YES ❑ NO

If not, why? _____

68. Do you believe that all *eye-witness observations* are accurate? ❑ YES ❑ NO

Why? _____

69. Will you consider along with all of the other evidence presented, the testimony of an *unavailable witness* whose prior testimony is read to you? ❑ YES ❑ NO

If not, why? _____

70. Will you automatically reject the testimony of an *unavailable witness* merely because the actual witness is not present? ❑ YES ❑ NO
If not, why? _____

71. Do you understand that in evaluating the evidence in this case you may use your *common sense* and consider your *common experience?* ❑ YES ❑ NO

If not, why? _____

_____

EXPERT WITNESSES

72. Would you be *able to listen* to a witness represented to be an expert in some type of scientific or technical field? ❑ YES ❑ NO

If not, why? _____

73. Would you be able to *keep an open mind* on their experience until their qualifications are established? ❑ YES ❑ NO

☛ JUDICIAL TIP: Some judges believe this question may not be clear to jurors and therefore do not ask it.

74. Would you *automatically believe* everything an expert said merely because the person is an expert? ❑ YES ❑ NO

INSTRUCTIONS ON THE LAW

75. If the judge gives you an *instruction on the law* that you feel is different from a belief or opinion you have, how will you deal with that conflict?

_____

76. The *testimony of a single witness* is sufficient to prove any fact if you believe the witness. Would you be willing to follow that instruction?

❑ YES ❑ NO If not, why? _____

_____

77. A defendant in a criminal case is *not required to prove* that he or she is innocent. Can you follow that instruction? ❑ YES ❑ NO

If not, why? _____

78. The defendant has the constitutional *right not to testify,* and that decision cannot be held against him or her in any way. Can you follow that instruction? ❑ YES ❑ NO

If not, why? _____

79. Would you *require the defendant to testify* before you would find the charges untrue? ❑ YES ❑ NO

If so, why? _____

80. Do you belong to any organization that advocates a *change in the laws*? ❑ YES ❑ NO

If so, what organization? _____

DELIBERATIONS

81. If you are chosen as a juror, do you promise to *freely discuss the law and the evidence* with your fellow jurors in the jury room DURING DELIBERATIONS in an effort to reach a verdict? ❑ YES ❑ NO

If not, why? _____

82. During deliberations, could you change your vote if the discussion showed to your satisfaction that your *initial conclusion* was wrong?
❑ YES ❑ NO

If not, why? _____

83. Would you change your position *merely* because the other jurors disagreed with you? ❑ YES ❑ NO

If yes, why? _____

84. During deliberations, it is the obligation of every juror to freely discuss the evidence and instructions with the other jurors. Will you agree to tell the Court if anyone *refused to deliberate* with the rest of the jury? ❑ YES ❑ NO

If not, why? _____

85. A courtroom drama in the *movies* or on television is altered or enhanced for dramatic effect. Would you be able to set aside your ideas about courtroom procedure or the law and decide this case without comparing this trial with movies or television? ❑ YES ❑ NO

If not, why? _____

86. Do you understand that you must *decide separately* the guilt or innocence of each defendant, each count, and each allegation?

❑ YES ❑ NO

CONCLUDING QUESTIONS

87. Understanding that jury service is an honor as well as a duty, is there *any reason* why you would *prefer not to serve* as a juror in this case? ❑ YES ❑ NO

If yes, why? _____

88. Do you have any health problems that might *limit your ability* to concentrate on the evidence during the trial? ❑ YES ❑ NO

If so, what? _____

89. Is there *anything else,* such as a personal problem, that might distract you during the trial? ❑ YES ❑ NO

If so, what? _____

90. Is there any reason why you would not be a *fair and impartial juror* for both the prosecution and the defense in this case?

❑ YES ❑ NO

If yes, what? _____

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING ANSWERS ARE TRUE, CORRECT, AND COMPLETE.

_____, California

Dated: _____ _____
(Signature)

_____
(Print Name)

THANK YOU FOR YOUR COOPERATION

B. [§98.102] Sample Form: Neutral Factual Statement in Juror Questionnaire

This is a murder case in which the defendant(s) [*is/are*] accused of _____. The name(s) of the decedent(s) [*is/are*] _____. The crime occurred in [*month 201__*] in _____. If you believe you know anything about this case, or any of the people involved, please explain in the portion of the questionnaire that asks for that information.

Following is an example of a neutral factual statement as it might appear in a juror questionnaire:

This is a murder case in which the defendants are accused of conspiracy to commit murder and two counts of first-degree murder with special circumstances alleged. The names of the decedents are Gerald Woodman and Vera Woodman. The crime occurred in September 1985 in the Brentwood area of West Los Angeles. At the time of the offense, the press referred to this case as the "Ninja Murder Case." If you believe you know anything about this case, or any of the people involved, please explain where indicated in the questionnaire.

C. [§98.103] Spoken Form: Orientation Talk to Jurors

In this case, should the defendant(s) _____ be convicted of first-degree murder with special circumstances, the prosecution will be seeking the death penalty.

Therefore, we need information, among other issues, about your views on capital punishment. There are several questions on this issue

contained in the written questionnaire, which we will be distributing to all of you this afternoon.

You will be instructed to take this questionnaire home and complete it this evening. I urge you to give the issues serious consideration before you begin to answer the questions. I realize that some of you may not have thought about this issue before, so I am letting you know in advance that you will need to do so now before you begin to complete the form.

The more information you give us, the less we will need to ask you in open court, so please take the time to answer the questions fully.

Death Penalty / Life Without Parole

In order to assist you in giving consideration to this issue, I want to provide you with some information about the history of capital punishment in California and the trial procedure in a capital case.

It has been my experience that many of our citizens have some real confusion and misinformation about our system of capital punishment, so I would like to take a minute to give you a brief history lesson, and some information about the state of the law today, which may eliminate some misconceptions you've had and assist you in completing the questionnaire. It's difficult to tell us your views on the law if you don't know what the law is.

In 1972, the death penalty law in California (and in many other states) was found to be unconstitutional by the United States Supreme Court. The court concluded that the law was too arbitrary; there was no way to determine in advance which murderers should face the death penalty and which should not.

At that time, there were many people on death row in California. Because the law under which they had been sentenced was invalidated, their sentences were commuted to life in prison. At that time, there was no punishment in our state known as life imprisonment without parole, so they all received sentences of life *with* parole possibility. It is because of this that men like Charlie Manson and Sirhan Sirhan keep coming up for parole review. I know it makes our citizens very nervous to think that these men might be paroled. What you need to know is that their cases are unique, and they are considered for parole only because of that change in the law.

In 1978, California passed a new death penalty law; it was an initiative on the ballot, passed by our voters. This law contained circumstances that could result in the death penalty and required a special finding by the jury as to the truth of those special circumstances. Second, it added a new punishment known as life in prison without possibility of

parole. Under that punishment, a defendant would never be released from prison.

This new law was tested (which took some years) and was found by both the California Supreme Court and the United States Supreme Court to be constitutional. Many people have now been convicted under this new law. As all of you are aware, many years passed before anyone was actually executed in California, and much of this time was consumed in the testing of the new law and the appellate review of the defendants' cases. However, there have been executions in California, and I anticipate there will be more in the near future.

What you need to know is the following: If either defendant in this case is found guilty of premeditated, first-degree murder, and if the special circumstances alleged are found to be true, then the jury will have the obligation of determining which punishment to impose.

There will be a second phase of the trial, which I will explain to you in a minute; at the conclusion of that phase, the jury will have only two options: death or life in prison without parole. You are to assume that both punishments mean exactly what they say; if you vote for death, that defendant will be executed, and if you vote for life in prison without parole, defendant will spend the rest of his (her) life in prison. I am giving you all of this very sobering information because it is important that you understand the significance of the questions we are asking you on the questionnaire and the decisions you could be required to make.

Penalty Phase

1. Initially, the jury will hear evidence and be asked to determine the guilt or innocence of each of the defendants; this is no different from any other criminal case. The defendants may not be convicted of any of the offenses charged against them unless all 12 jurors are convinced of their guilt beyond a reasonable doubt.

2. If the jury finds the defendant(s) guilty of first-degree murder, and if the jury finds the special circumstance(s) to be true, then we will begin the second phase of the trial in which the jury will be asked to decide what penalty will be imposed; the jury will be given the alternatives of life in prison without possibility of parole, or death.

3. In any other criminal case (other than a capital case), I would be deciding what the punishment should be. When I do that, I hold a sentencing hearing and get information about the defendant. I learn about his or her criminal record, if any; the defendant's childhood, family life, work history, whether he or she has a violent propensity; both positive and negative things about the defendant. I consider those factors, and the

facts of the case that I learned in the trial, and decide what the sentence should be.

In a capital case, the difference is that the jury becomes the sentencing body. You listen to information about the defendant's background—both good and bad information about him or her—take that into consideration along with the evidence you heard about the crime the defendant was just convicted of, and decide between the two punishments that are allowed by law.

4. Of course, we have no idea if we will ever get to the penalty phase of this trial, and your views on capital punishment may not be relevant in the long run, but this is the only chance we have to learn your views on this issue; we all recognize the questioning is premature, but we have to engage in it at this early stage just in case we need to proceed to a penalty phase later.

Answering the Questionnaire

It is very important that you answer these questions completely on your own. Do not discuss the questions or your answers with anyone else, including members of your family. We want *your* views, not anyone else's.

There are additional pages at the back of the questionnaire for any confidential information, or lengthy answers. Please do not write on the backs of pages.

If you do not understand a question, it's undoubtedly our fault for not making it clear; please just indicate you don't understand it.

Your telephone numbers on the front of the questionnaire will be retained by the court and not released to anyone else, not even the attorneys.

There are no right or wrong answers; there are no trick questions.

As you leave today, please take a questionnaire home with you. You are now free to leave for the day and are instructed to return here [*day of week*] [*morning at 9:00 / afternoon at 1:30*] with the completed questionnaire. You will be here only briefly [*day of week*], at which time you will be given an appointment to return for brief questioning by the court and the attorneys. Both today and [*day of week*] count as a full day of jury service, even though you will be with us only a short time.

Contacting the Court

The telephone number in this courtroom is: _____. Call with any problems.

You are now assigned to this court, and will continue to come only here until you are excused from this trial; you need not return to the jury assembly room.

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